

**Witherwax v Transcare, Inc.**

2007 NY Slip Op 30629(U)

January 16, 2007

Supreme Court, New York County

Docket Number: 0114065/2003

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

CHARLES J. WITHERWAX and MARIANNE J. WITHERWAX,

Plaintiffs,

- v -

TRANSCARE, INC. d/b/a METROCARE and ROES ONE through TEN,

Defendants.

INDEX NO. 114065/03  
MOTION DATE  
MOTION SEQ. NO. 002  
MOTION CAL.NO.

**FILED**

JAN 24 2007

NEW YORK

COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion for judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1,2</u>
Answering Affidavits - Exhibits (Memo) _____	<u>3</u>
Replying Affidavits (Reply Memo) _____	<u>4</u>
Cross Motion: [ ] Yes [X] No	

Upon the foregoing papers, it is ordered that this motion is denied, for the reasons set forth below.

Background

Plaintiffs bring this action to recover damages they allegedly sustained as a result of the acts and omissions of defendant Transcare d/b/a Metrocare (Transcare), in, among other things, failing to note the correct address of plaintiff Charles H. Witherwax. As a result, Transcare failed to send Mr. Witherwax an invoice for ambulance services and eventually referred the matter to a collection agent, who notified various credit bureaus of an unpaid "bad debt".

The charges at issue were incurred on June 14, 2000, when Mr. Witherwax's physician called an ambulance operated by Transcare to take him to a hospital (Affirmation of. Bret A. Scher, Esq. in Support of Motion [Scher Aff. in Support], Ex. A [Complaint], at ¶ 4). The ambulance driver allegedly obtained Mr. Witherwax's address and insurance information from his

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wife (Scher Aff. in Support, Ex. D [C. Witherwax Dep.], at 9-10). In addition, the driver was present when Mr. Witherwax was admitted to the hospital, at which time the hospital obtained his address and insurance information (Complaint, at ¶ 5). Apparently, Transcare noted the incorrect address and insurance information for Mr. Witherwax. Several invoices sent by Transcare to Mr. Witherwax for the ambulance services were returned from the Post Office as undeliverable (Scher Aff. in Support, Ex. C [Transcare Dep.], at 58). Nevertheless, despite the fact that Transcare had obtained the correct telephone number for Mr. Witherwax, the company did not call him to verify his address and insurance information, which they had incorrectly noted as “self pay” (*id.*, at 78-82).

After a period of time, Transcare referred the matter to Paul Michael Marketing Services, Inc. (Paul Michael), a collection agent (Transcare Dep., at 82-84). Paul Michael had received the incorrect address and insurance information from Transcare and never corrected it (*id.*, at 115-117). Paul Michael never contacted Mr. Witherwax about the ambulance bill either by mail or by telephone and, consequently, Mr. Witherwax was not aware of the outstanding debt (Complaint, at ¶ ¶ 7,8). Mr. Witherwax asserts that he first became aware of this matter in or about March 2002, when he received a notice from one credit card company that it was reducing his line of credit by \$3,200, from \$25,000 to \$21,800 (Complaint, at ¶ 8; C. Witherwax Dep., at 12-13). After investigating this matter, Mr. Witherwax discovered that Paul Michael had notified several credit reporting bureaus of the “bad debt” represented by the unpaid ambulance bill (Complaint, at ¶ ¶ 8,9; C. Witherwax Dep., at 13).

#### Federal Action

In June 2002, plaintiffs brought an action in federal court against Paul Michael and Transcare, asserting claims under the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, as well as common law claims for negligence, gross negligence and defamation of credit (Scher Aff. in Support, Ex. M). Plaintiffs resolved their claims against Paul Michael for the sum of \$20,000, and the parties executed a mutual release providing, in pertinent part, “This

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release does not affect any rights of any of the parties hereto against any third party, unless that third party is an employee of Paul Michael Associates, Inc. aka Paul Michael Marketing or the Plaintiffs herein, including without limitation, Defendants Transcare, Inc. dba Metrocare..." (Scher Aff. in Support, Ex. E).

In a decision and order dated July 26, 2004, Hon. Kimba M. Wood vacated Transcare's default, but dismissed the claims against Transcare under the FDCPA, as that statute applies only to third-party collection agents and not to creditors. Judge Wood also declined to exercise pendent federal jurisdiction over the common-law state claims asserted against Transcare (Scher Aff. in Support, Ex. F).

#### State Action

In or about October 2003, plaintiffs commenced the instant action against Transcare, asserting causes of action for negligence, gross negligence, defamation of credit and exemplary and punitive damages (Scher Aff. in Support, Ex. A). Transcare moved, pursuant to CPLR 3211 (a) (7), to dismiss the complaint. In a decision entered on April 26, 2005, Hon. Marilyn Shafer dismissed the causes of action for gross negligence, defamation of credit and punitive and exemplary damages. Justice Shafer concluded, however, that the complaint sufficiently pleads a cause of action for negligence. She noted, "Mr. Witherwax contends that Transcare negligently furnished its agent [Paul Michael] with erroneous information knowing that its agent would rely on and use the information in pursuit of Transcare's claim against the plaintiffs" (Scher Aff. in Support, Ex. G, at 7 [parenthetical supplied]).

After the completion of discovery, Transcare moves for summary judgment, pursuant to CPLR 3212 on the remaining negligence cause of action.

#### Discussion

Transcare asserts that the primary theory relied upon by plaintiffs is the alleged vicarious liability of Transcare for the acts of Paul Michael. According to Transcare, Paul Michael is an independent contractor and, thus, Transcare cannot be vicariously liable for Paul Michael's acts or

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omissions. Even assuming, for the sake of argument, that Transcare can establish at trial that Paul Michael was an independent contractor, Transcare can still be held liable to plaintiffs. Generally, “a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for an independent contractor’s negligent acts ...” (*Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]). This principle “is based on the premise that one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is sensibly placed on the contractor ....” (*id.*, at 274). The Court of Appeals recognized, however, that there are several exceptions to this general principle, derived from public policy concerns, which “fall roughly into three basis categories: negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or ‘inherently’ dangerous ... and, finally, instances in which the employer is under a specific nondelegable duty ...” (*Kleeman v Rheingold*, 81 NY2d at 274; *see also Saini v Tonju Assocs.*, 299 AD2d 244 [1<sup>st</sup> Dept 2002]; *Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 299 [1<sup>st</sup> Dept 2000]; *Maristany v Patient Support Servs., Inc.*, 264 AD2d 302, 303 [1<sup>st</sup> Dept 1999]).

Applying the above principles, there is a triable issue of fact as to whether Transcare is vicariously liable for Paul Michael’s reporting of the “bad debt” to the credit bureaus and Mr. Witherwax’s employer, based upon the erroneous information and instructions Transcare provided to Paul Michael concerning Mr. Witherwax’s address and insurance information. In addition, plaintiffs may adduce evidence at trial that Transcare was negligent in selecting Paul Michael as a collection agent (*see Melbourne v New York Life Ins. Co.*, 271 AD2d at 299 [triable issue of fact as to whether company engaged by life insurer to provide underwriting information was negligent in selecting another company to conduct paramedical examinations of policy applicants]). In addition to a negligence claim based upon the vicarious liability of Transcare for the acts and omissions of Paul Michael, the complaint also alleges a claim for direct negligence against Transcare for, among other things, noting an incorrect address and insurance information for Mr. Witherwax and transmitting this erroneous information to Paul Michael (Complaint, at ¶¶ 11-13, 24).

Accordingly, there is a triable issue of fact as to Transcare's liability to plaintiffs under a direct negligence theory<sup>1</sup>, as well.

Transcare asserts that plaintiffs have not adduced sufficient evidence of the damages they sustained as a result of Transcare's alleged negligence, both in terms of economic loss and alleged emotional injuries. Plaintiffs have established that the erroneous report of the "bad debt" to the credit bureaus resulted in the reduction of the credit line on one of their credit cards by \$3,200. Mr. Witherwax states that he will use a forensic accountant to establish the economic losses he sustained as a result of the impairment of his credit. This constitutes sufficient evidence of an economic loss to create a triable issue of fact.

Plaintiffs' claims for emotional injuries are set forth in conclusory allegations (*see* Complaint, at ¶ 22), and are supported only by their speculative assertions (*see* Scher Aff. in Support, Ex. L [C. Witherwax Aff.], at ¶ ¶ 3,4). Moreover, the acts and omissions of Transcare do not rise to the level of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community", in order to support an award of damages for negligent infliction of emotional distress (*Sheila C. v Povich*, 11 AD3d 120, 130-131 [1<sup>st</sup> Dept 2004] [internal quotations omitted]; *see also Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [1<sup>st</sup> Dept 2005]; *Stauber v New York City Tr. Auth.*, 10 AD3d 280, 281-281 [1<sup>st</sup> Dept 2004]). Therefore, plaintiffs may not recover damages for emotional distress and mental anguish and, thus, plaintiffs' claim for

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<sup>1</sup> Plaintiffs assert that the decision of Justice Shafer, denying Transcare's motion to dismiss the negligence cause of action pursuant to CPLR 3211 (a) (7), is dispositive of this Court's ruling on Transcare's motion for summary judgment. A decision on a motion to dismiss, however, does not constitute law of the case with respect to a subsequent motion for summary judgment, as a motion to dismiss is addressed to the sufficiency of the pleadings, while a summary judgment motion concerns the sufficiency of the evidence underlying the pleadings (*see Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 350 [1<sup>st</sup> Dept 2006]; *Riddick v City of New York*, 4 AD3d 242, 245 [1<sup>st</sup> Dept 2004]; *Gannone v Wittman*, 232 AD2d 298 [1<sup>st</sup> Dept 1996]; *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, Inc.*, 128 AD2d 467, 468-469 [1<sup>st</sup> Dept 1987]). This Court determines that, based upon the pleadings and the evidence adduced during discovery, there are triable issues of fact with respect to the negligence of Transcare, based upon both a theory of vicarious liability, as well a direct negligence theory.

\* 6 ]  
this relief is dismissed.

Lastly, Transcare asserts that the doctrine of election of remedies bars plaintiffs from maintaining this action against Transcare, after proceeding against that company's alleged agent, Paul Michael. Plaintiffs point out, however, that General Obligations Law (GOL) § 15-108 (a) explicitly provides, as follows:

“When a release or covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless the express terms so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.”

Accordingly, plaintiffs' settlement with Paul Michael in the federal action does not preclude them from proceeding in this action against Transcare (*see Whalen v Kawasaki Motors Corp., U.S.A.*, 91 NY2d 288, 293-295 [1998]; *Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332,340-341 [1993]; *Nevarez v City of New York*, 261 AD2d 206, 207 [1<sup>st</sup> Dept 1999]). Indeed, as pointed out above, the mutual release executed by plaintiffs and Paul Michael in the federal action specifically provided that the settlement does not affect plaintiffs' rights against Transcare (Scher Aff. in Support, Ex. E).

Finally, the doctrine of election of remedies only applies where the remedies sought are inconsistent, as they proceed on opposite and irreconcilable claims of rights (*see Simon v Boyer*, 51 AD2d 879, 880 [4<sup>th</sup> Dept 1976], *affd* 41 NY2d 822 [1977]). In this case, plaintiffs' claims of negligence asserted against Paul Michael are fully consistent with the claims of negligence asserted against Transcare, and the settlement with Paul Michael does not preclude them from maintaining this action against Transcare.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied, except to the extent that plaintiffs' may not recover damages for emotional distress and mental anguish; and it is further

ORDERED that, within 30 days of entry, plaintiffs shall serve upon defendants a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 1/16/07

ENTER:   
Doris Ling-Cohan, JSC

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if Appropriate:  DO NOT POST  REFERENCE

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