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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the12th day of December, 2016

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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STACY GREENE as the Administratrix of the Estate of GRETA DEVERE GREENE, Deceased, and on Behalf of her distributees, and SUSAN FRIERSON,

Plaintiffs,

-against-

EXPLANADE VENTURE PARTNERSHIP, D&N CONSTRUCTION AND CONSULTING, INC., BLUE PRINTS ENGINEERING, P.C. and MASQSOOD FARUQI,

Defendants.

Index No.:510780/15

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion and Exhibits (Affirmations)__	1-2
Opposing Affirmation____________________	3
Reply Affidavit (Affirmations)____________	4

After oral argument and a review of the submissions, the Court finds as follows:

Plaintiffs move the Court for leave to amend the verified complaint pursuant to CPLR §3015 (b) to add an additional cause of action on behalf of Plaintiff Susan Frierson under the "zone of danger" doctrine set forth in *Bovsun v. Sanperi*, 61 NY2d 219, 230-231 (1984).

Defendants oppose said motion on the grounds that Plaintiffs have failed to comply with the procedural requirements of CPLR §3025(b), and the proposed amendments by Plaintiffs are palpably insufficient and without merit.

Background

Pursuant to Plaintiff Susan Frierson's Affidavit in Support of her Motion, she affirms the following:

On Sunday, May 17, 2015, the infant Maternal Granddaughter of Plaintiff Susan Frierson, Greta Devere Greene (now deceased) had taken a walk to to the Esplanade building near Plaintiff Frierson's residence after Greta spent the night with her Grandmother. Plaintiff Frierson sat on a bench in front of the Esplanade building, Greta stood next to her. Suddenly, debris fell from the Esplanade building above Greta and her Grandmother, striking Greta on her head, and Plaintiff Frierson on the left knee and right ankle. Plaintiff Frierson observed Greta on the ground in a fetal position and attempted to call "911" but was shaking so badly she couldn't. Instead, Plaintiff lifted Greta from the ground, placed her on the bench, and as she was not breathing, attempted "mouth to mouth" resuscitation. After some difficulty, she stated to breathe, and the ambulance arrived. Plaintiff was taken in a separate ambulance to the same hospital. Greta died the next morning from her injuries.

Plaintiffs were initially represented in this action by Rappaport, Glass Levine & Zullp, LLP. On September 2, 2015, Rappaport commenced this action by filing the summons and complaint which named various Defendants. On December 1, 2015, Rappaport filed an "Amended Summons and Complaint" removing two named Defendants, and adding two new Defendants, Masqsood Faruqi, and D & N Construction and Consulting, Inc. This amendment was as of "right". The amended Complaint included two causes of action, each asserted against all four of the Defendants.

On January 29, 2016, Plaintiffs filed a fully-executed consent to change attorney form substituting the law firm of Gait, Gait, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, for Rappaport as Counsel for Plaintiffs.

As a result, New Plaintiffs' Counsel moved pursuant to CPLR 3025(b) for leave to amend the complaint a second time. The Court having now reviewed the original Summons and Complaint, the Amended Summons and Complaint, and the proposed Second Amended Summons and Complaint finds that the Second Amended Summons and Complaint revealed an added cause of action, Negligent Infliction of Emotional Distress. While Plaintiffs' counsel referred to this Cause of Action, as the Zone of Danger cause of action, the "zone of danger" is actually one of the elements of Negligent Infliction of Emotional Distress. Negligent infliction of emotional distress is defined as "where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family – assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing such injury or death". *Bovsun v. Sanperi*, 61 N.Y.2d 219, 230-231, 473 N.Y.S. 2d 357, 461 N.E. 2d 843 (NY 1984).

Defendants' Opposition

Defendants contend that Plaintiffs' have failed to comply with the procedural requirements of CPLR 3025 (b) in that they failed to annex to their motion papers "the proposed amended or

supplemental pleading clearly showing the changes or additions to be made to the pleading." Having carefully reviewed Plaintiffs' Second Amended Complaint, it finds that said complaint adds two causes of action - Number 3 being a cause of action in negligence resulting in physical injury and emotional injury, and Number 4 being a cause of action in Negligent infliction of emotional distress. Both of these are recognized in the State of New York as causes of action. They were clearly marked "Third" and "Fourth" in the proposed complaint. According, the Court finds that Plaintiffs were in substantial compliance with the requirements of CPLR 3025(b), and that no party was prejudiced by the format employed by Plaintiff.

Defendants claim that in order to meet all of the elements of negligent infliction of emotional distress, Plaintiff must have been in a "zone of danger" at the time of negligence and physical injury to a family member, that she must have observed the negligent act injure the third party, and the injuries or death of the family member caused severe emotional trauma to the Plaintiff.

In the instant matter, Plaintiff Frierson was in the "zone of danger" as she was injured along with her Granddaughter. Plaintiff witness the falling object from the side of the nearby building hit her Granddaughter in the head. She attempted to revive Greta and Greta was able to breathe when the ambulance arrived, but died the next morning in the hospital.

Plaintiff has provided information about her relationship with her Granddaughter which may lead a court or jury to determine that Plaintiff, was indeed, and immediate family member, which is required to prevail in a third-party claim for negligent infliction of emotional distress. While the cases on this issue in New York have been few, there are cases where third-parties with close familial-like relationship to the negligence victim have prevailed in such causes of action. In a most important case interpreting negligent infliction of emotional distress in New York, *Bovsun v. Sanperi*, Kugel 61 N.Y. 2d 219 (NY 1984) found that "Where a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in her or his presence, the plaintiff may recover damages for such injuries." At "footnote 13" in the body of the decision, the Bovsun court states: "Inasmuch as all plaintiffs in these cases were married or relating in the first degree of consanguinity to the injured or deceased person, we need not now decide where lie the out limits of "the immediate family". *Trombetta v. Conkling*, 82 NY 2D 549 (NY 1993) found that where an niece who had resided with her Aunt since she was 11 years old, tried to prevent her Aunt from being run over by a truck, and they had remained close although both were now middle aged adults, Plaintiff niece could not prevail in a negligent infliction of emotional distress cause of action as they were not immediate family.

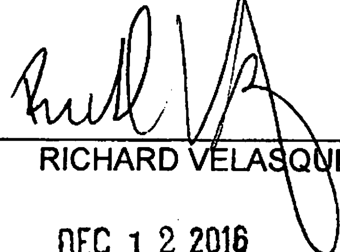
In *Sullivan V. Ford Motor Co.* 2000 WL 343777 (United States District Court, S.D New York 2000) the Court found than an Aunt who witnesses the death due to negligence of her one year old nephew, was entitled to receive damages pursuant to a cause of action for negligent infliction of emotional distress by deeming the Aunt immediate family. The Aunt acted as a parent to her nephew, and therefore, the Court reasoned, it was not expanding the definition of immediate family, but rather recognizing the relationship the two actually had.

Thus, it is up to a trier of fact to determine whether the facts of this action can support a claim for negligent infliction of emotional distress.

Accordingly, the Court grants Plaintiffs' motion to allow it to file and serve a Second Amended Complaint. Said Complaint shall be served within twenty days of the Notice of Entry.

This constitutes the Decision and Order of the Court.

ENTER.



RICHARD VELASQUEZ. J.S.C

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So Ordered
Hon. Richard Velasquez

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