

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

D35269
C/hu

_____AD3d_____

Submitted - May 8, 2012

MARK C. DILLON, J.P.
RANDALL T. ENG
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2011-04959

DECISION & ORDER

Annette Miserendino, et al., appellants, v City of
Mount Vernon, et al., respondents.

(Index No. 28816/09)

Reisman, Rubeo & McClure, LLP, Hawthorne, N.Y. (Mark A. Rubeo, Jr., of
counsel), for appellants.

Loretta J. Hottinger, Corporation Counsel, Mount Vernon, N.Y. (Hina Sherwani of
counsel), for respondents.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from
an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered April 12, 2011, which
granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The injured plaintiff allegedly sustained injuries when she tripped and fell on a fire
hose used by the defendant Fire Department of the City of Mount Vernon (hereinafter the Fire
Department), to combat a fire in her apartment building. The injured plaintiff and her husband, suing
derivatively, commenced this action against the Fire Department and the City of Mount Vernon
(hereinafter together the City). After issue was joined, the City moved for summary judgment
dismissing the complaint on the ground that the firefighters and police officers on the scene were
performing discretionary governmental functions and owed no special duty to the injured plaintiff.
The Supreme Court granted the City's motion, the plaintiffs appeal, and we affirm.

“[G]overnment action, if discretionary, may not be a basis for liability, while

ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general” (*Valdez v City of New York*, 18 NY3d 69, 76-77, quoting *McLean v City of New York*, 12 NY3d 194, 203; see *United Servs. Auto. Assn. v Wiley*, 73 AD3d 1160, 1163). Here, the defendants established that, at the time of the injured plaintiff’s fall, they were performing discretionary rather than ministerial acts. Thus, in the absence of a special relationship with the injured plaintiff giving rise to a special duty, the City could not be held liable for the actions of its employees. In opposition to the City’s prima facie showing, the plaintiffs failed to raise a triable issue of fact as to whether a special relationship existed between the injured plaintiff and the City (see *McLean v City of New York*, 12 NY3d at 199, 201-203; *United Servs. Auto. Assn. v Wiley*, 73 AD3d at 1163).

Accordingly, the Supreme Court properly granted the City’s motion for summary judgment dismissing the complaint.

The parties’ remaining contentions either need not be reached in light of our determination or are without merit.

DILLON, J.P., ENG, AUSTIN and SGROI, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court