

Mosley v City of New York

2024 NY Slip Op 31084(U)

March 22, 2024

Supreme Court, Kings County

Docket Number: Index No. 527313/2019

Judge: Patria Frias-Colón

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 25 HON.
PATRIA FRIAS-COLÓN, J.S.C.

-----X
Dar Es Salaam Mosley, as Administratrix of the Estate
of O’Neal Shurome Mosely, and Dar Es Salaam Mosley,
individually,

Index # 527313/2019
Cal. #s 16, 17, 18
Mot. Seq. #s 9, 11, 12

PLAINTIFFS,

DECISION/ORDER

-against-

Recitation as per CPLR §§ 2219(a) and/or
3212(b) of papers considered on review of this
motion:

The City of New York, New York City Housing
Authority, John “Doe” #1, John “Doe” #2,

NYSCEF Doc. #s 212-216; 271 by Def City
NYSCEF Doc. #s 228-233; 277, 280 by Plaintiff
NYSCEF Doc. #s 255-263; 290 by Def Herc
NYSCEF Doc. #s 264-270; 288 by Def NYCHA

DEFENDANTS.

-----X
New York City Housing Authority,

Third-Party Plaintiff,

-against

Herc Rentals Inc., d/b/a Hertz Equipment Rental
Corporation,

Third-Party Defendant.

-----X

Upon the foregoing cited documents and after oral argument on December 13, 2023, pursuant to CPLR § 3211 (a)(7), the Decision and Order on Defendant City of New York (“City”), Defendant/Third-Party Plaintiff New York City Housing Authority (“NYCHA”), and Third-Party Defendant Herc Rentals, Inc., doing business as Hertz Equipment Rental Corporation (“Herc”), for an Order, pursuant to CPLR 3211 (a) (7), dismissing the underlying complaint, the third-party complaint, and all cross-claims as against each such defendant or third-party defendant (as applicable) for failure to state a cause of action, is as follows.

BACKGROUND

In the early morning of Saturday, March 10, 2018, O’Neal Shurome Mosley (“Mosley”) was shot (twice) and killed by one or more unknown assailants in front of a building that was part of the Louis Armstrong public housing complex (the “complex”).¹ Mosley, age 24 at the time, did not reside at the complex. On December 16, 2019, Mosley’s mother, Dar Es Salaam Mosley, individually and as the administratrix of her late son’s estate (collectively, “Plaintiff”), commenced this action against the City and NYCHA.² On January 8, 2020, NYCHA answered the complaint.³ NYCHA’s answer did not assert governmental immunity as an affirmative defense.⁴ Thereafter, by Decision and Order, dated July 26, 2023

¹ NYSCEF Doc. # 214 at pg.’s 4-5.

² *Id.*

³ NYSCEF Doc. # 268.

⁴ *Id.*

(Frias-Colon, J.), the City's answer was deemed served and accepted by Plaintiff (*see Mosley v City of New York*, 2023 WL 5528904 [Sup Ct, Kings County 2023]).⁵ The City's answer (unlike that of NYCHA) included governmental immunity as an affirmative defense.⁶

NYCHA filed a third-party complaint against Herc, alleging claims of common-law indemnity, contractual indemnity, contribution, and breach of contract to provide insurance, as well as for recovery of its defense costs, together with indemnification for any judgment or settlement it may owe.⁷ Each of the third-party claims relates to Herc's contract with NYCHA to provide LED tower lights at (among other locations) the incident area. Herc answered the third-party complaint.⁸

Plaintiff's theory of liability as against the City and NYCHA (collectively, "Defendants"), as reviewed (and conformed to Plaintiff's Notice of Claim as against NYCHA) by the Second Judicial Department on appeal from a prior Order of the Court, dated November 23, 2020 (Knipel, J.), is circumscribed to "NYCHA's [and, by extension, the City's] alleged failure to provide adequate lighting at the specific location where [Mosley] was shot and killed" (*Mosley v City of New York*, 217 AD3d 857, 860 [2d Dept 2023]).⁹ In that regard, the Court takes judicial notice that by Decision and Order, dated October 13, 2022 (Levine, J.), this Court granted Plaintiff leave to file a late notice of claim against the City (*Mosley v New York City Hous. Auth.*, 76 Misc 3d 1229 [A], 2022 N.Y. Slip Op. 51077 [U] [Sup Ct, Kings County 2022]). The Second Judicial Department's limitation of the scope of Plaintiff's extant claim against NYCHA similarly limited the scope of her claim as against the City.

DISCUSSION

Defendants and Herc all move to dismiss this action based on, among others, the governmental immunity defense.¹⁰ As a threshold matter, the Court must address whether NYCHA may raise the defense of governmental immunity in a post-answer CPLR § 3211(a)(7) motion where its answer did not plead governmental immunity as an affirmative defense. Contrary to Plaintiff's contention, NYCHA's failure to raise governmental immunity as an affirmative defense earlier is not necessarily fatal. An unpleaded defense may serve as the basis for the dismissal of a complaint in the absence of surprise or prejudice to the opposing party (*see Sullivan v American Airlines, Inc.*, 80 AD3d 600, 602 [2d Dept 2011]; *Millbrook Hunt v Smith*, 249 AD2d 283, 284 [2d Dept 1998]; *see also Laga v Unitrin Auto & Home Ins. Co.*, 76 Misc. 3d 131 [A], [N.Y. App. Term. 2022]). Here, NYCHA's motion papers completely apprised Plaintiff of its governmental immunity defense, and Plaintiff, who was clearly aware of all the facts underlying said defense, has had a full opportunity to address the same in her opposition papers. Thus, while NYCHA (unlike the City) did not raise the governmental immunity defense in its answer, its post-answer CPLR § 3211(a)(7) motion effectively retracted the waiver, particularly since the Plaintiff can make no viable claim of surprise or prejudice (*see Barrett v Kasco Constr. Co.*, 56 NY2d 830 [1982]; *GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 40 [2d Dept 2020] ("[f]ailure to plead a defense that must be pleaded affirmatively under CPLR 3018[b] is a waiver of that defense, unless it is raised by a motion under CPLR 3211[a]" citing 5 Weinstein-Korn-Miller, NY Civ Prac: CPLR § 3018.18]; *see also McIvor v Di Benedetto*, 121 AD2d 519, 522 [2d Dept 1986] [adjudication of summary judgment motion based on an unpleaded defense permissible in light of procedural history and lack of surprise to plaintiff]).

⁵ NYSCEF Doc. # 210.

⁶ NYSCEF Doc. # 150 at pg.'s 27-30.

⁷ NYSCEF Doc. # 68.

⁸ NYSCEF Doc. # 78.

⁹ NYSCEF Doc. # 199.

¹⁰ NYSCEF Doc. #s 212, 256, 265.

All three motions raise the governmental immunity defense in the context of a common-law tort action. In a common-law negligence action, a plaintiff must demonstrate the following: (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). Where a municipality is the alleged tortfeasor, it is held to the ordinary duty of care in the exercise of proprietary functions. However, where the municipality exercises governmental functions, only a breach of a “special duty” to the injured party can lead to liability (*see Ferreira v City of Binghamton*, 38 NY3d 298, 309 [2022], citing *Schrempf v State of New York*, 66 NY2d 289, 294 [1985]); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]). Defendants argue that their function *vis-à-vis* the housing complex at which Mosley was shot and killed was primarily governmental, not proprietary in nature, requiring plaintiff to plead a special duty of care owed to Mosley in order to state a cause of action.

The question of whether a government or quasi-governmental entity is operating in a governmental or proprietary realm involves a “continuum of responsibility,” spanning from purely proprietary acts of “simple maintenance and repair” to clearly governmental functions, like “maintenance of general police and fire protection” (*see Clinger v New York City Transit Auth.*, 85 NY2d 957, 959 [1995]). Moreover, even in the scope of proprietary functions, “if the essential nature of the governmental agency’s injury-causing acts or omissions was a failure to provide security involving police resources (i.e., police protection) then a governmental function was being performed” (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 452 [2011]; *see Tara N.P. v Western Suffolk Bd. Of Coop. Educ. Servs.*, 28 NY3d 709, 713 [2017] [acts undertaken for protection and safety of the public pursuant to general police powers are governmental in nature]; *see also Miller v State of New York*, 62 NY2d 506, 512 [1984] [any issue relating to safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State’s alleged negligent action falls into, either a proprietary or governmental category]).

As noted, the Second Judicial Department has limited the scope of Plaintiff’s claim to Defendants’ alleged negligence (if any) in failing to provide adequate lighting at the incident location.¹¹ Plaintiff argues that the failure to maintain lighting was a negligent act or omission with respect to providing safety from criminal activity at the site of the incident.¹² Under these circumstance, the ultimate concern with security and protection from crime places the proprietary task of lighting maintenance in the realm of governmental activity (*see Thompson v New York*, 78 NY2d 682 [1991]); *see also Miller v State of New York*, 62 NY2d 506, 512 [1984]; *Petkevich v MTA*, 38 AD3d 513, 514 [2d Dept 2007] [where MTA’s failure to provide adequate lighting in area where assault occurred implicated government function, governmental immunity barred finding of negligence in the absence of a special duty to plaintiff]; *Farber v New York City Tr. Auth.*, 143 AD2d 112, 114 [2d Dept 1988] [maintenance of a subway station implicated governmental function in the context of liability for damages arising from criminal acts committed by a third party thereon]).

Where the allegedly negligent act or omission falls in the category of a governmental function, plaintiff must show the municipal entity owed a special duty to the plaintiff (*see Ferreira*, 38 NY3d at 309; *Applewhite*, 21 NY3d at 426). To show the assumption of a special duty, plaintiff must satisfy four elements: (1) municipality’s assumption, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) municipality’s knowledge that inaction could lead to harm; (3) direct contact between the municipality’s agents and the injured party; and (4) justifiable reliance on the municipality’s affirmative undertaking (*see Cuffy v New York*, 69 NY2d 255, 261-262 [1987]; *Howell v City of New York*, 39 NY3d 1006, 1008-1009 [2022]).

Nowhere in her complaint (as limited by her notice of claim) does Plaintiff allege that Defendants

¹¹ NYSCEF Doc. # 199.

¹² NYSCEF Doc. # 228.

assumed a special duty toward Mosley.¹³ She only alleges Defendants' general duties of care to residents of the complex.¹⁴ Based on Plaintiff's failure to state that a special duty was owed by Defendants to Mosley, her complaint (as limited by her notice of claim) fails to state a cause of action as against Defendants (*see Petkovic*, 38 AD3d at 514; *McPherson v New York City Hous. Auth.*, 228 AD2d 654, 655 [2d Dept 1996]). In any event, courts have consistently found that NYCHA has no special duty to protect plaintiffs from criminal acts in the public outdoor common areas of its housing projects (*see Daly v City of New York*, 227 AD2d 432, 432 [2d Dept 1996] [NYCHA owed no duty to visiting individual who was fatally shot by a tenant in the outdoor commons area of the complex]; *McPherson*, 228 AD2d at 655 [no special duty existed where tenant of NYCHA housing complex sustained several gunshot wounds while sitting on a bench outside of her building]; *Concepcion v New York City Hous. Auth.*, 207 AD2d 857, 858 [2d Dept 1994] [NYCHA had no duty to protect plaintiff from mugging on an exterior public walkway within the housing complex]).

Inasmuch as the underlying action fails as against Defendants, the third-party complaint against Herc is rendered moot and therefore also dismissed (*see Sanchez v BBL Constr. Servs., LLC*, 202 AD3d 847, 851 [2d Dept 2022]; *Nicola v United Veterans Mutual Housing No. 2, Corp.*, 178 AD3d 937, 940 [2d Dept 2019]; *Ingram v Long Is. Coll. Hosp.*, 101 AD3d 814, 816 [2d Dept 2012]).

The Court has considered the parties' remaining contentions and found them either unavailing or moot in light of its determination.

Accordingly, Defendants' and Third-party Defendant Herc's respective motions (motion sequence numbers 9, 11, and 12) to dismiss Plaintiff's complaint are granted, and the complaint and the third-party complaint are each dismissed with prejudice, without costs or disbursements.

All relief not expressly granted herein, has been considered, and is denied.

This constitutes the decision and order of the court.

Date: March 22, 2024
Brooklyn, New York



Hon. Patria Frias-Colón, J.S.C.

¹³ NYSCEF Doc. # 214.

¹⁴ *Id.*