

**Marquez v City of New York**

2005 NY Slip Op 30475(U)

March 29, 2005

Sup Ct, NY County

Docket Number: 123370/01

Judge: Michael D. Stallman

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

PRESENT: MICHAEL D. STALLMAN  
*Justice*

PART 5

Index Number : 123370/2001  
MARQUEZ, RAYMOND  
vs  
CITY OF NEW YORK  
Sequence Number : 2  
STRIKE A PLEADING

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

1-5

this motion to/for SP/ SJ

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Notice of x-m h-m  
Answering Affidavits — Exhibits \_\_\_\_\_  
Answer Aff to x-m  
Replying Affidavits \_\_\_\_\_

1  
3  
4  
5

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

APR 05 2005

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"is determined in accordance with the  
annexed memorandum decision and order."

**HON. MICHAEL D. STALLMAN**

Dated: 3/29/05

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5**

-----X  
Raymond Marquez,

Plaintiff,

-against-

The City of New York and The New York City  
Department of Corrections,

Defendants.  
-----X

**HON. MICHAEL D. STALLMAN, J.:**

**Index No. 123370/01**

**Decision and Order**

**FILED**

APR 05 2005

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COUNTY CLERK'S OFFICE**

Plaintiff moves for an order (1) pursuant to CPLR § 3126(3) striking defendants' answer or in the alternative, precluding defendants from submitting evidence at trial as to those items that defendants have failed to provide during discovery, (2) extending plaintiff's time to conduct defendants' depositions and (3) extending plaintiff's time to file his note of issue. The City cross-moves for an order dismissing the complaint on the grounds that "plaintiff failed to establish a special duty relationship and therefore failed to establish a claim in common law tort," (Aff in Support of Cross-motion, para. 1). In its papers, the City has not addressed plaintiff's second cause of action seeking damages for lost items of personal property.

Plaintiff seeks monetary damages for personal injuries allegedly sustained while he was detained at the Manhattan Detention Center located at 125 White Street, New York, New York and at various jails located on Riker's Island, Bronx, New York. Specifically, plaintiff alleges he developed bladder cancer and injury to the urethra as a result of second-hand smoke he inhaled at these correctional facilities. Plaintiff alleges that the City was negligent by failing to house the plaintiff in a smoke-free environment.<sup>1</sup> Plaintiff also alleges that his personal property was lost as a result of being transferred throughout these jails.

On a prior motion for summary judgment, the Court, inter alia, already noted that the notice of claim and complaint stated a cognizable common-law tort. In essence, plaintiff has stated a premises liability claim, to wit: by permitting smoking in DOC facilities, defendants caused and created a condition that was not reasonably safe. As a building owner, the City has a duty to act as a reasonable person would to maintain its premises in a reasonably safe condition. See Valentine v State, 192 Misc.2d 706 (State has duty to maintain gym equipment on premises of correctional facility in a safe condition). Whether the premises were reasonably safe, or if not, whether defendants were negligent, and if so, whether such negligence was a substantial factor in causing the injuries alleged, are issues for trial.

Defendants cross-move to dismiss the complaint on the grounds that plaintiff failed to establish a special duty relationship and therefore failed to state a claim against the municipal defendants in common law tort. Generally, the special duty rule limits a municipality's duty to protect a plaintiff from third-persons (e.g. would-be assailants) or from harmful forces (e.g. fires). See gen. Lauer v City, 95 NY2d 95. Where applicable, the rule provides that a municipal defendant has no duty to act unless and until it assumes a special duty to that particular plaintiff to do so.

Here, plaintiff is alleging that the City defendants acted either intentionally or negligently, e.g., by subjecting plaintiff to a smoky environment. See Notice of Claim, January 16, 2001; Complaint, December 12, 2001. The City's duty of care to plaintiff was triggered when it took him into custody. See Sanchez v State, 99 NY2d 247 (State owes a duty of care to safeguard inmates, having assumed physical custody of inmates who cannot protect and defend themselves in the same way as those at liberty can); Kagan v State, 221 AD2d 7 (State owes a duty to its incarcerated citizens to provide them with adequate medical care).

The special duty doctrine is not applicable to the case at bar where the claims relate to whether the municipal defendants' acts or omissions caused or created a condition claimed to be not reasonably safe. Under the City's overbroad interpretation of the special duty doctrine, no duty would ever attach to any interaction between the City or a City employee and an individual, whether in custody or not. While governmental immunity may be raised as a defense in appropriate situations where plaintiff pleads a violation of a special duty, this defense was not pleaded in the City's answer; it is inapplicable to this situation, and is insufficient to support summary judgment dismissing the complaint as a matter of law.

Accordingly, the City's cross-motion dismissing the remaining branch of the first cause of action alleging common law tort is denied.

As for plaintiff's motion, the City shall respond to plaintiff's July 21, 2004 notice for discovery and inspection as agreed to in the August 17, 2004 so-ordered stipulation.<sup>2</sup> Specifically, the City shall produce all records pertaining to plaintiff while he was in the custody of the Department of Corrections from July 31, 1998 through January 3, 2001 except for the records pertaining to the Correctional Health Services, on or before May 11, 2005.

As for the records pertaining to cigarette sales at the commissaries of all facilities where plaintiff was held from January 1, 1998 until January 30, 2001, which the City agreed to search for in the so-ordered stipulation dated August 17, 2004, the City shall search for such records and disclose them on or before May 11, 2005. If a diligent search produces no records, the City shall file an affidavit from an individual with the Department of Corrections having personal knowledge of the search and the City's record-keeping practices, detailing what was searched and the negative result, on or before May 11, 2005. If the City fails to comply with this order, the City shall be

precluded from disputing at trial that large quantities of cigarettes were sold to inmates from the City's prison commissaries during the period and in the locations where plaintiff was held in custody.

As for prisoner complaints involving second-hand smoke, the City shall turn over any records pertaining to complaints about air quality due to second-hand smoke for the period July 31, 1998 through January 3, 2001, on or before May 11, 2005. If a diligent search produces no records, the City shall file an affidavit from an individual with the Department of Corrections having personal knowledge of the search and the City's record-keeping practices, detailing what was searched and the negative result, on or before May 11, 2005.

As for records pertaining to environmental testing of the internal air quality and the presence of cigarette smoke performed in the subject correctional facilities during the period plaintiff was in custody, (July 31, 1998 through January 3, 2001) the City shall turn over all such records on or before May 11, 2005. If a diligent search produces no records, the City shall file an affidavit from an individual with the Department of Corrections having personal knowledge of the search and the City's record-keeping practices, detailing what was searched and the negative result, on or before May 11, 2005.

Without resolving any factual issues, the Court notes that there does not appear to be any disagreement between the parties that smoking is prevalent in various prison areas, or that a large body of scientific evidence has indicated that exposure to second-hand cigarette smoke can pose health hazards. Of critical important in this case are the mixed issues of proximate causation and contributory causation, i.e., plaintiff's prior health habits and medical history which are also trial issues.

Defendant shall be deposed on May 18, 2005 at the Office of the Corporation Counsel, 100 Church Street, New York, New York, or at another date and location agreed to by the parties in a signed writing.

Given the discovery schedule set forth above, the compliance conference scheduled for April 26, 2005, is rescheduled for May 31, 2005 at 9:30 a.m., 80 Centre Street, Room 103. Plaintiff's time to file a note of issue is extended to May 31, 2005.

This constitutes the decision and order of the Court.

Dated: March 29, 2005  
New York, New York

ENTER:

  
MICHAEL D. STALLMAN, J.S.C.

HON. MICHAEL D. STALLMAN

1. By decision and order dated July 8, 2004, the Court granted partial summary judgment to defendants, dismissing an alleged statutory violation of the New York State Clean Indoor Air Act.

2. In the August 17, 2000 stipulation (para. 3) the City agreed to respond to plaintiff's notice dated July 21, 2004 within 30 days. That Notice to Produce dated July 21, 2004 sought "all records pertaining to plaintiff, Raymond Marquez, prisoner number 349-98-16340, while he was in the custody of the New York City Department of Corrections from on or about July 31, 1998 through and including on or about January 3, 2001, at Riker's Island Correctional Facility and the New York City House of Detention located on White Street in Manhattan, except for the records pertaining to the Correctional Health Services, but including all other records for plaintiff while he was being held without bail pending trial."

**FILED**

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