[* 1] INDEX NO. 163339/04 4/25/2007

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

PRESENT: HON. KAREN SMITH PART 62

Justice

Grace Alava

INDEX NO. 163339/04

MOTION DATE 2/8/07

MOTION SEQ. NO. 002

MOTION CAL. NO.

-v-

The City of New York, New York City Department of Homeless Services, New York City Health and Hospitals Corp., and Bellevue Hospital Center

The following papers, numbered 1 to 5 were read on this motion to/for Strike the answer and cross-motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1
Notice of cross-motion - affidavits - exhibits	2
Answering Affidavits — Exhibits	3
Replying Affidavits	4, 5

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order.

FILED

APR 25 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/17/07

J.S.C.

HON. KAREN SMITH

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 62

----------X

GRACE ALAVA,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, THE NEW YORK CITY HEALTH & HOSPITALS CORPORATION, BELLEVUE HOSPITAL CENTER, and VICTOR RIVERA

Defendants.

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Index no.: 103339/04
Motion seq.: 002
Motion date: 2/8/07

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiff Grace Alava's motion seeking an order striking defendants' answer or, in the alternative, directing further discovery, is granted in part and denied in part. Defendants City of New York, New York City Department of Homeless Services, New York City Health & Hospitals Corporation and Bellevue Hospital Center's (hereinafter collectively referred to as "defendants")[1] motion for summary judgment and costs and disbursements is hereby denied, as discussed more fully below.

Plaintiff Grace Alava brought the instant action to recover for injuries suffered when she was choked by Victor Rivera, a prospective client, while she was engaged in taking Rivera's fingerprints and photograph at Bellevue Hospital Center, Department of Homeless Services. Issue was joined by service of an answer by defendants on or about March 26, 2004. Plaintiff brought the instant motion, seeking an order: 1) striking defendants' answer for failure to provide discovery; 2) extending plaintiff's time to file her note of issue; 3) ordering defendants to appear

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[1] The Court notes that Victor Rivera is also a named defendant, but is not a party to this motion. As such, the Court will refer to Rivera by name when necessary and all other defendants collectively as "defendants".

for depositions and respond to plaintiff's discovery demands; 4) permitting ex-parte depositions or interviews of several witnesses as an alternative to ordering defendants to conduct such depositions; and 5) directing defendants to provide an unredacted copy of the co-defendant, Victor Rivera's statement. Defendants oppose plaintiff's motion and cross-move to dismiss pursuant to CPLR § 3211(a)(7) or, alternatively, for summary judgment pursuant to CPLR § 3212, and for costs and disbursements pursuant to CPLR §§ 8101 and 8106.

Plaintiff submits the following documents in support of her motion: 1) three NYC Department of Homeless Services Incident Report Statement Form, each dated March 12, 2003, completed by George Williams, Carol Chambers, and David Ward, respectively; 2) a NYC Department of Homeless Services Incident Report, dated March 12, 2003; 3) two documents that appear to be New York City Police Department documents related to the arrest of the attacker, Victor Rivera; 4) four Notices to defendants, all dated July 30, 2004, for EBTs of David Ward, Carol Chambers, George Williams, and Michael Gagliardi, respectively; 5) plaintiff's demand for discovery and inspection, dated April 6, 2004 and defendants' response dated May 26, 2005; 6) plaintiff's demand for a Bill of Particulars on defendants' affirmative defenses; a so-ordered discovery stipulation dated August 4, 2005; 7) a hand-written statement by defendant Rivera, accompanied by a handwritten statement prepared by an unidentified person; and 8) the EBT of George Williams, dated September 6, 2006.

In support of their motion, and in opposition to plaintiff's motion, defendants submit: 1) plaintiff's notice of claim; 2) the transcript of plaintiff's examination pursuant to General Municipal Law § 50(h), dated June 20, 2003; 3) EBT of plaintiff, dated March 15, 2005; 4) EBT of defendant New York City Department of Homeless Services by Glenn Panazzolo, dated June 14, 2005; 5) EBT of defendant New York City Department of Homeless Services by Elsi Cruz, dated April 25, 2006; 6) two so-ordered discovery stipulations, one dated May 11, 2006 and the other undated; 7) defendants' response to plaintiff's demand for discovery and inspection; 8) defendants' response to plaintiff's demand for a Bill of Particulars as to affirmative defenses; and 9) a letter from defendants to Hon. Marilyn Shafer dated August 4, 2006, indicating that they submitted several documents for her *in camera* review.

Defendants' Cross-Motion for Summary Judgment

Defendants filed a cross-motion for summary judgment contending that plaintiff cannot establish that they assumed a special duty of care to protect her from assault, and that without such a special relationship, the defendants are immune from suit by virtue of the fact that they were performing a governmental function. Defendants' cross-motion will be addressed here first, since a grant of summary judgment would dispose of the discovery issues raised in plaintiff's motion.

The facts are contained in the parties' motion papers and are not in material dispute unless noted otherwise. Plaintiff was employed by Sagem Morpho, Inc, a private company, to perform data entry duties for the New York City Department of Homeless Services ("DHS") in one of its facilities located next to Bellevue Hospital. Plaintiff alleges in her complaint that Sagem Morpho was under contract with defendants to provide such services, an allegation not contradicted by defendants in their moving papers. According to her 50(h) and EBT testimonies, plaintiff's job was to talk to potential shelter clients and gather personal information which she would then enter into a database, then to take potential clients' fingerprints and photograph. She also testified that a peace officer was always stationed outside of the office in which she worked, in addition to other officers and/or other security in the shelter, but that "they would make rounds around the different rooms." In his EBT testimony, George Williams, a motor vehicle operator employed by DHS, confirmed that in March 2003, as a matter of practice, he saw a manned security post on the first floor in the hallway by the fingerprinting office where plaintiff worked. On March 12, 2003, at approximately 6:15 p.m., as plaintiff was working alone in the office interviewing co-defendant Victor Rivera, a potential shelter client, she was attacked by Rivera. According to plaintiff's testimony, Rivera stood up and took off his belt, telling plaintiff that he was going to kill her. Rivera proceeded to push her against the wall with his belt pressed up against her neck, choking plaintiff. During the assault, Williams walked by or into plaintiff's office and saw plaintiff up against the wall. Williams testified in his EBT that he pulled Rivera off plaintiff and held him until security came, and that during that time Rivera told Williams that he wanted to kill plaintiff. According to the EBT testimony of Glenn Panazzolo, Director of DHS's peace officers, the peace officers work in shifts: midnight to 8:00 a.m.; 8:00 a.m. to 4:00 p.m.; and 4:00 p.m. to midnight. While plaintiff testified that there was a security guard outside the door of the office when she

began her shift at 3:00 p.m., both Williams and plaintiff testified that at the time of the assault, there was no security posted outside the door of the office.

Plaintiff filed the instant action alleging that defendants and/or their agents, servants, employees, contractors, subcontractors or licensees were negligent in their provision of security services at the facility. Defendants cross-moved seeking an order granting them judgment as a matter of law dismissing the complaint and any cross-claims against it, contending that plaintiff is unable to prove a claim against them because the defendants had no specific duty to her and, in the alternative, were engaged in a the performance of a governmental function, i.e. operation of a homeless shelter, and are therefore protected from suit by governmental immunity.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). A defendant, to prevail on a motion for summary judgment, must be able to establish that plaintiff is unable to prove at least one of the essential elements of the cause of against it. (*Bray v. Rosas,* 29 AD3d 422 [1st Dept. 2006]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, the Court views the evidence presented in the light most favorable to the non-moving party and draws all reasonable inferences in its favor. (*Weiss v. Garfield*, 21 AD2d 156 [3rd Dept. 1964]).

It is well established that in order for a municipality to be liable to an individual claimant for the negligent exercise of a governmental function, the claimant must be able to establish the existence of a "special relationship" between that individual and the municipality. (*Kircher v. City of Jamestown*, 74 NY2d 251 [1989]). This requirement stems from the principal that a municipality generally has only a duty to the public-at-large and not to a particular person, (*Kircher v. City of Jamestown, id.*), and that a municipality's decisions regarding governmental functions, including provision of police protection, "has long been regarded as a resource-allocating function that is better left to the discretion of the policy makers." (*Cuffy v. City of New York*, 69 NY2d 255 [1987]). However, the "special relationship" exception has been carved out in order to impose

liability upon a municipality where its own "affirmative conduct which, having induced the citizen's reasonable reliance, must be considered to have progressed to a point after which the failure to provide the promised protection will result 'not merely in withholding a benefit, but positively or actively in working an injury.'" (*Kircher v. City of Jamestown*, 74 NY2d 251, 256 [1989] [internal citations omitted]). The elements of a "special relationship" are:

> 1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) some form of direct contact between the municipality's agents and the injured party; and 4) that party's justifiable reliance on the municipality's affirmative undertaking.

(*Kircher v. City of Jamestown*, *id.*; *Cuffy v. City of New York*, 69 NY2d 255). Once a municipality assumes such a duty to a particular person or class of persons, it must perform that duty in a non-negligent manner. (*Florence v. Goldberg*, 44 NY2d 189, 196 [1978]).

In support of their cross-motion, defendants present testimony by Panazzolo, who did not work in the Bellevue facility but oversees the entire peace officer's program for DHS, including approximately 350 officers at various locations. Panazzolo testified regarding the command log for the date of the assault, March 12, 2003, for the shift beginning at 4:00 p.m., which was marked as an exhibit at his deposition. Panazzolo identified two sergeants and seven peace officers which were stationed throughout the facility at the time of the assault, two of whom were assigned to what he called "roving patrol" on the first floor. However, Panazzolo was not at the facility on the date in question, did not assign the officers or create the command log, and had no personal knowledge of the events of that date. As such, his testimony is only useful for background information on the peace officer program and general standards and practices, but does not answer the question of whether an officer of DHS or any other security personnel hired by defendants was *actually* assigned to the post outside of plaintiff's door the date of the assault or whether such security was regularly assigned to that post.

Defendants also submit the EBT transcript of Elsie Cruz, a special officer for DHS who was assigned to the security post at the main entrance to the shelter on the day of the assault. Cruz specifically testified that she did not witness the assault, that she did not respond to the assault, that she had no independent knowledge of any officers who responded to the assault, that she did not

know plaintiff nor did she know Rivera.

Defendants do not dispute that security personnel, either employed by or hired by DHS or another municipal entity, were regularly assigned to the post immediately outside plaintiff's office door. Neither do defendants deny that there was not, at the time of the assault, security outside plaintiff's office. Rather, defendants contend that plaintiff has failed to establish a "special relationship" because, 1) neither plaintiff nor Rivera, the attacker, were employed by defendants; 2) the attack was unforeseeable and plaintiff has not proffered any evidence that defendants were aware that Rivera posed a threat; 3) plaintiff has not demonstrated that she communicated any information to defendants, prior to the attack, upon which she reasonably and detrimentally relied; and 4) plaintiff cannot establish that the defendants had knowledge that any "inaction" on their part would result in harm to plaintiff.

Contrary to defendants' contention, the employment status of plaintiff and co-defendant Rivera are inapposite to the issue of a "special relationship," as the elements listed above make clear. Further, the Court of Appeals has found that a "special relationship" can exist where the municipality has assumed "a duty to a particular person *or class of persons*." (*Florence v. Goldberg*, 44 NY2d 189 [1978]). Defendants cite to no case holding that, in circumstances where the municipality has allegedly assumed a duty to a class of persons - as opposed to a particular person - a claimant must show she made complaints about the alleged negligence prior to the injury, or that the municipality must have been aware of the specific threat which caused injury. In *Florence v. Goldberg*, the Court of Appeals found that the municipality voluntarily assumed a duty to a class of persons when it provided a police crossing guard at a particular intersection for children on their way to school. In that case, the plaintiff parent observed the crossing guard each day for at least two weeks before allowing her daughter to walk the several blocks to school alone, feeling assured that a crossing guard would help her daughter cross a busy intersection unharmed. The plaintiff brought suit against the municipality when her daughter was hit by a car and killed on a day on which no crossing guard was provided. The Court held that the municipality had voluntarily assumed the duty to provide a crossing guard, understanding the potential injury which could result if a guard was not provided, and that the plaintiff's observations of the crossing guard were sufficient to satisfy the "direct contact" element of a "special relationship." Finally, the Court

found that plaintiff was reassured by the presence of the crossing guard and relied on such continuing presence when she decided to allow her daughter to walk to school unaccompanied. (44 NY2d 189 [1978]).

In finding a voluntary assumption by the municipality, the Court in *Florence* relied heavily on the police department's own rules and regulations, which provided that if an officer was unable to report for crossing guard duty, he was to notify the precinct in order to make other arrangements and where more urgent police duties pulled him away from the crossing, the officer was required to notify both the precinct and the principal. In the instant matter, defendants have not produced a witness knowledgeable about the assignment of security to particular posts, the internal policies, if any, pertaining to absence from a post, or even whether there was security assigned to this particular location on a regular basis. Defendants have failed to submit any evidence in this regard to show that it did not assume a duty to provide security to individuals working in plaintiff's location. However, we have testimony from both plaintiff and an eye witness, both of whom worked in the building on a regular basis, that there was "always" an officer assigned to the door outside plaintiff's office. Thus, defendants have not met their burden of establishing entitlement to judgment as a matter of law through the submission of evidence in admissible form.

While defendants contend that plaintiff cannot establish that she justifiably relied upon their assurances, it is well-settled that a claimant can establish reliance by showing she forewent other available means of protection, including reducing her own vigilance. (*Cuffy v. City of New York*, 69 NY2d 255 [1987]). As all reasonable inferences are drawn in the non-moving party's favor on a motion for summary judgment, it is reasonable, for purposes of this motion only, to infer from plaintiff's own testimony that she relied on the ongoing protection of security, particularly in her statements that security was so prevalent and so consistently present in the building that she was unaware that the security officer had left the post outside her door on the day of the assault. Likewise, despite their contention that plaintiff cannot establish defendants were aware of the threat posed by Rivera specifically, as defendants have offered no contrary evidence on the question, it is reasonable to infer from the deposition testimony of plaintiff, Williams, and Panazzolo, that defendants recognized an ongoing threat of violence or disruption and provided security at the homeless shelter in order to, at least in part, protect workers there from any such

occurrence.

As defendants have failed to make a *prima facie* showing, through submission of admissible evidence, that there are no material issues of fact and that they are entitled to judgment as a matter of law, defendants' motion for summary judgment is denied.

Plaintiff's Motion To Strike Defendants' Answer or For Further Discovery

Plaintiff brought the instant motion seeking an order: 1) striking the defendants' answer for failing to provide discovery; 2) extending her time to file the note of issue; 3) in the alternative, directing further depositions of defendants and response to plaintiff's discovery demands; 4) in the further alternative, permitting plaintiff to conduct depositions and/or interviews of witnesses to the assault in an *ex parte* manner; and 5) ordering defendants to produce an unredacted copy of the statement of co-defendant Rivera.

Plaintiff seeks to have the defendants' answer stricken based on defendants' alleged refusal to 1) respond to plaintiff's demand for discovery and inspection and demand for Bill of Particulars as to affirmative defenses, both dated April 6, 2004; 2) produce an unredacted copy of co-defendant Rivera's statement; and 3) produce additional witnesses for deposition.

The Court may strike a party's pleading pursuant to CPLR § 3126 upon a showing that such party has failed to comply with an order of the court directing disclosure. Such a drastic measure is generally reserved, however, for those cases in which one party has been contumacious or has acted in bad faith. (*Bassett v. Bando Sangsa Co., Ltd.*, 103 AD2d 728 [1st Dept. 1984]). Because actions should be decided on the merits whenever possible, parties should be afforded reasonable latitude and an opportunity to comply before the harshest available penalty, striking a pleading, is imposed. (*Bassett v. Bando Sangsa Co., Ltd., id.*).

As a preliminary matter, the Court notes that plaintiff's first ground for striking the answer - defendants' alleged refusal to respond to her discovery demands - appears to be moot based on the papers submitted on this motion. Plaintiff submits her demand for discovery and inspection dated April 6, 2004 and claims defendants have failed to respond; however, attached to her demand is defendants' response dated May 26, 2005. Defendants also include their response with their papers. No further demand for discovery and inspection is offered by plaintiff. As to plaintiff's allegation that defendants have failed to respond to her demand for a Bill of Particulars, defendants

submit their response dated October 18, 2005.

Plaintiff also contends that defendants were ordered to submit an unredacted copy of co-defendant Rivera's statement to the court for *in camera* review to determine whether the statement was properly redacted, but failed to do so. In response, defendants submit a cover letter dated August 4, 2006 addressed to Justice Marilyn Shafer, the justice assigned to the case at that time, which outlines several documents submitted for *in camera* review on that date. However, plaintiff maintains that she never received the carbon copy defendants represent was sent to her, and Justice Shafer's chambers represents that if the documents were submitted they are no longer in her possession. No order has been issued addressing the redaction. As a result, the *in camera* review of the documents is still outstanding and defendants must re-submit the documents to this Court for a determination.

Finally, plaintiff seeks additional depositions of two eye-witnesses to the assault and a deposition of Michael Gagliardi, allegedly the commissioner in charge of security at the shelter where the assault took place. Defendants have not represented whether each of the witnesses are, in fact, their employees. Rather, defendants argue that at the last appearance with Justice Shafer, plaintiff sought the same depositions and Justice Shafer refused to grant them, directing plaintiff to file the note of issue. Plaintiff disputes this account, contending that Justice Shafer directed her to seek further discovery by motion if necessary, but all parties agree that no order was issued by Justice Shafer at the conference.

Plaintiff submits the written incident reports and notices to take deposition of eye-witnesses David M. Ward, George Williams, and Carol Chamber, of which only Williams was produced for a deposition. Plaintiff contends that she is entitled to depose each eye-witness to the assault. Defendants, however, argue that they have produced one eye-witness and that plaintiff has failed to demonstrate that additional eye-witnesses are "material and necessary" to plaintiff's prosecution of the case, pursuant to CPLR § 3101(a), presumably because the testimony would be duplicative of Williams' testimony.

The terms "material and necessary" under CPLR § 3101(a) should be interpreted liberally to require disclosure of material bearing on the controversy which will assist preparation for trial. (*Allen v. Crowell-Collier Publ'g Co.*, 21 NY2d 403, 405 [1968]). The test is one of usefulness and

reason, and should permit discovery of testimony sufficiently related to the issues in litigation to make the effort to obtain it reasonable. (*Allen v. Crowell-Collier Publ'g Co., id.*).

Here, plaintiff's demand to depose each of the three eye-witnesses to the assault is not unreasonable. Each witness will have a different recollection of the events and witnessed different aspects of the assault. It is clear, also, that defendants did not directly employee all of the individuals working in the shelter, as plaintiff herself was employed by a private company hired by defendants. It is possible that defendants did not employ and, therefore, cannot produce Chamber or Ward; however, if the witnesses worked at the shelter or had another relationship with the defendants which caused them to be located at the shelter on the day of the assault, plaintiff is entitled to such information that will assist in locating the witnesses for deposition. Finally, if the witnesses were employed by defendants but are no longer employees, defendants must provide plaintiff with a last known address for subpoena as non-party witnesses.

While defendants object to plaintiff's demand to depose Michael Gagliardi, allegedly the commissioner in charge of security at the shelter, because they have already produced two witnesses, neither witness has had any knowledge whatsoever of the actual security conditions in the shelter on the day and at the time of the assault. Rather, defendants produced one witness, Panazzolo, with general knowledge of the security program but no personal knowledge of the specific shelter, and another witness, Elsie Cruz, with virtually no personal knowledge of any information relevant to this case. Contrary to defendants' contention, merely providing two witnesses who work in the DHS peace officer program, without regard to their ability to provide relevant testimony, does not comply with the disclosure requirements of the CPLR. Plaintiff is entitled to a deposition of a witness with personal knowledge of the assignments and arrangements of security at the shelter in question both in general and on the date of the assault, as such testimony is "material and necessary" to plaintiff's case. If Gagliardi is qualified to testify to such issues, defendants must produce him in response to plaintiff's notice to depose; otherwise, defendants must produce another such qualified witness.

Accordingly, it is;

ORDERED that defendants' motion for summary judgment is hereby denied; and it is further

ORDERED that defendants submit the following redacted documents for *in camera* review and determination by Justice Smith, with privilege log and in accordance with the Court of Appeals' case law establishing procedure for *in camera* submissions, within 30 days of the date of this order: 1) DHS incident report prepared by the Superintendent and reviewed by the Director of the Bellevue Hospital Center for the Homeless; 2) three DHS incident report statement forms; 3) one personal statement of Victor Rivera; and 4) one excerpt from the Command Log for the incident date generated as a result of the subject altercation; and it is further

ORDERED that defendants produce Carol Chamber and David M. Ward for deposition within 60 days of the date of this order, date, time and location to be agreed upon by the parties; or, if no longer employed by defendants, the last known address of same within 30 days of the date of this order; or, if never employed by defendants, an affidavit by a person with knowledge identifying defendants' relationship with each individual within 30 days of the date of this order; and it is further

ORDERED that, as the court is providing defendants with a copy of this decision and order, defendants are directed to serve a copy of this decision and order upon plaintiff within 5 days of receipt of same; and it is further

ORDERED that the parties appear for a compliance conference on June 21, 2007 at 9:30 a.m., at 80 Centre Street, Room 280, at which time a date for the filing of the note of issue will be set.

The foregoing constitutes the decision and order of this court.

Dated: April 17, 2007

ENTER:

Hon. Kar[illegible]S. Smith, J.S.C.