

Melaine v City of New York

2007 NY Slip Op 32128(U)

July 10, 2007

Supreme Court, New York County

Docket Number: 0107203/1999

Judge: Karen Smith

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

PRESENT: **HON. KAREN SMITH**

PART 62

Justice

Index Number : 107203/1999
LAWRENCE, MELAINE
 VS.
CITY OF NEW YORK
 SEQUENCE NUMBER : 004
 SUMMARY JUDGMENT

INDEX NO. 107203/99
 MOTION DATE 5/17/07
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2
3, 4

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

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
 JUL 16 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 7/9/07

[Signature]
HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

RETURNED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
MELAINE LAWRENCE,

Plaintiff,
-against-

Index no.: 107203/99
Motion seq.: 004
Motion date: 5/17/07

DECISION AND ORDER

THE CITY OF NEW YORK and ANNETTE
FELICIA SOUTHWELL,
Defendants.

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,
-against-

PETROCELLI ELECTRIC CO., INC.
Third-Party Defendant.

-----X

FILED
JUL 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Defendant The City of New York's motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint as against it or, in the alternative, dismissing plaintiff's complaint as against it pursuant to CPLR § 3126, for failure to comply with so-ordered stipulations regarding the production of certain discovery, is granted in part and denied in part, as discussed more fully below.

Plaintiff brought the instant action to recover for personal injuries she allegedly suffered as a result of a motor vehicle accident on January 11, 2007. Issue was joined as to The City of New York ("City") on approximately May 10, 1999; defendant Annette Felicia Southwell

("Southwell"), the driver of a second vehicle, appears to have never appeared in this matter. The City subsequently brought a third-party action against third-party defendant Petrocelli Electric Co., Inc. ("Petrocelli"). The Court granted Petrocelli's motion for summary judgment dismissing the third-party complaint against it in an order dated May 17, 2007. The City now moves for an order granting it summary judgment dismissing plaintiff's complaint as against it or, in the alternative, dismissing plaintiff's complaint for her failure to produce previously ordered discovery.

In support of its motion, the City submits: 1) the pleadings and plaintiff's notice of claim; 2) plaintiff's EBT dated June 5, 2006; and 3) so-ordered discovery stipulations dated June 29, 2006 and August 31, 2006. Plaintiff opposes the motion and submits: 1) a Police Accident Report; 2) portions of plaintiff's EBT; 3) so-ordered discovery stipulations dated May 20, 2004, August 5, 2004, February 10, 2005, June 23, 2005, September 15, 2005, March 23, 2006, May 18, 2006, and June 29, 2006; and 4) the EBT of Officer Peter Sala dated April 10, 2007.

The facts presented in this case are not in material dispute. On January 11, 1998, the plaintiff was driving her car and approached the intersection of St. Nicholas Avenue and West 137th Street, New York, New York. The traffic signal controlling traffic was a steady red in all directions. Plaintiff stopped her car and waited for an unknown period of time before determining that the traffic signal was not going to change and she should proceed through the intersection. Plaintiff testified in her EBT that she looked to her right to determine whether any cars were approaching, and saw Southwell's vehicle also stopped at the steady red light. Plaintiff proceeded into the intersection at which time her car and Southwell's car collided. The police responded to the scene of the accident and Officer Peter Sala ("Sala") subsequently filed an

accident report based on his investigation at the scene. At his EBT, Sala testified that when he responded to the scene the traffic signal was out, there were no police officers, Department of Transportation or Department of Traffic personnel directing traffic at the intersection, and that he could not recall anyone working on the traffic signal while he was on the scene. Sala also testified as to his knowledge of general procedure and practice when a traffic signal is reported as non-functioning.

The City moves for summary judgment dismissing the plaintiff's complaint as against them, contending that 1) the malfunctioning traffic signal was not, as a matter of law, the proximate cause of plaintiff's injuries, and 2) since managing and directing traffic is a government function, the City cannot be held liable to plaintiff unless it created a "special relationship", which it did not. Plaintiff opposes the City's motion, contending that the case law cited by the City is inapposite to this case and that there are issues of fact regarding the actions or non-action of the City upon allegedly learning that the traffic signal was not properly functioning.

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]). 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]).

The City has made a *prima facie* showing of entitlement to judgment as a matter of law on plaintiff's claims of negligence in maintaining the malfunctioning traffic signal. Plaintiff testified in her EBT that she lived only a couple of blocks from the intersection in question and

that, prior to the date of the accident, she drove through the intersection on a regular basis.

Plaintiff also testified that when she stopped at the solid red light, traveling north on St. Nicholas Avenue, she was aware that the light was not functioning and took precautions - such as looking for approaching cross-traffic - before entering the intersection.

In a nearly indistinguishable case, the Appellate Division, Second Department¹ reversed the decision of the Supreme Court which denied the City's motion to dismiss the claim. (*Minemar, et al. v. Khramova, et al.*, 29 AD3d 750, 751 [2006]). In *Minemar*, the plaintiff stopped at a malfunctioning traffic light, waited for approximately 30 to 60 seconds, looked down the one-way street for approaching traffic and, seeing none, proceeded into the intersection where his car was struck by another vehicle. In reversing the lower court, the Appellate Division held that,

where the plaintiff driver was fully aware of the malfunctioning traffic light and the consequent need to exercise caution in proceeding through the intersection, any negligence on the part of the City in maintaining the traffic light was not the proximate cause of the accident.

(*Minemar, et al. v. Khramova, et al., supra*).² In another case, *Rubinfeld v. City of New York*, the Appellate Division, Second Department reversed a the decision of the trial court, which denied the City's post-trial motion to dismiss. (263 AD2d 448 [1999]). The plaintiff in *Rubinfeld* was a pedestrian who was struck by a vehicle as she crossed an intersection in which the "walk/don't walk" signal was not functioning. As in *Minemar*, the plaintiff noted that the light was not

¹ The parties have cited to, and the Court has found, no published Appellate Division, First Department cases which deal squarely with this issue of proximate cause.

² While plaintiff contends that the *Minemar* case is inapposite because it relies on a Vehicle and Traffic Law enacted after plaintiff's accident, plaintiff is mistaken. The court does not cite to any statutory authority, only case law, to support its determination.

working, looked in both directions of traffic, and crossed the street, where she was struck by an approaching vehicle. (*Rubinfeld v. City of New York, supra*). The *Rubinfeld* court wrote,

Under these circumstances, we conclude that the inoperative status of the “walk/don’t walk” signal was not the proximate cause of [Plaintiff’s] accident and thus there is no basis for liability against the defendant City of New York. Although the issue of proximate cause is generally one to be determined by the finder of fact, it is the function of the court to determine if a *prima facie* case of causation has been established in the first instance. Moreover, it is well settled that to establish a *prima facie* case, a plaintiff must show that “defendant’s negligence was a substantial cause of the events which produced the injury.”

(*Rubinfeld v. City of New York*, 263 AD2d at 450 [internal citations omitted]; *see also Bisceglia v. International Business Machines*, 287 AD2d 674 [2nd Dept. 2001] [where the drivers were familiar with the intersection and testified that the malfunctioning light did not confuse them, the traffic signal was not the proximate cause of the accident]). This position has also been adopted in an unpublished New York County Supreme Court decision in the matter *Mena v. City of New York*. (Index No. 109978/04, Decision and Order [Sup. Ct. N.Y. Co. September 8, 2006] [Rakower, J.]).

As the City has met its burden of making a *prima facie* case of entitlement to judgment as a matter of law on plaintiff’s claim for negligent maintenance of the traffic signal, and plaintiff has failed to submit evidence in admissible form raising an issue of fact requiring trial, the City must be granted summary judgment on this claim.

The City has also met its burden of establishing its right to summary judgment as a matter of law on plaintiff’s section cause of action. In the second cause of action, plaintiff alleges that the City was negligent in failing to provide police officers or other personnel to direct and/or supervise traffic between the time the traffic signal stopped working and the time of plaintiff’s

accident. The City moves for summary judgment contending that, as traffic control is a governmental function, it may not be held liable to plaintiff unless plaintiff can demonstrate that a “special relationship” existed between plaintiff and the City, thereby creating an individual duty to her.

It is well settled that a municipality bears no liability for negligent performance of governmental functions by its agents, absent the existence of a special relationship between the injured party and the municipality. (*Kircher v. City of Jamestown*, 74 NY2d 251 [1989]; *Cuffy v. City of New York*, 69 NY2d 255 [1987]). “Like crime prevention, traffic regulation is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers.” (*Balsam v. Delma Engineering Corp., et al.*, 90 NY2d 966 [1997]). 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) the injured party’s justifiable reliance on the municipality’s affirmative undertaking.

Plaintiff has not alleged or submitted any evidence to indicate that the City established a “special relationship” with her. Rather, plaintiff contends that the City is liable here, irrespective of the “special relationship” rule, because it had actual or constructive notice of the malfunctioning traffic signal. The Court notes that the only evidence plaintiff submits to demonstrate actual or constructive notice, is inadmissible hearsay which may not properly be considered on a motion for summary judgment.³ (*See Zuckerman v. City of New York*, 49 NY2d

³ Plaintiff submits the accident report written by Officer Sala in an effort to show that the City received actual notice of the signal’s malfunction at 9:00 a.m. the day of plaintiff’s accident. However, Sala testifies in his EBT that he received that information from the

557 [1980]). However, even if the City had actual or constructive notice of the malfunctioning traffic signal and failed to provide police or other City personnel to direct traffic in the intersection, such notice does not defeat the requirement that there be a "special relationship" between plaintiff and the City in order for the City to be liable for her injuries. (*See Cuffy v. City of New York*, 69 NY2d 255 [1987]). As such, plaintiff has failed to raise a material issue of fact requiring trial to defeat the City's motion.

That portion of the City's motion seeking dismissal pursuant to CPLR § 3126 is denied as moot.

Accordingly, it is;

ORDERED that defendant City of New York's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant City of New York only, and that upon service of a copy of this decision and order, together with notice of entry hereof, the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements; it is further

ORDERED that, as there is no evidence that a default judgment has been sought or granted against co-defendant Southwell, the remainder of the action shall continue; it is further

ORDERED that, upon service of a copy of this decision, together with notice of entry hereof, the Clerk is directed to transfer this matter to a non-City part; it is further

dispatcher and that he had no personal knowledge of any report being made. Additionally, Sala testified that when a report is made, the dispatcher creates a log entry to record the report and who is notified of the outage. No log records have been submitted, nor did the dispatcher testify at an EBT or submit an affidavit regarding the alleged report. While Sala's report is admissible, statements contained therein based on information about which he has no personal knowledge are not.

ORDERED that movant serve a copy of this decision and order, together with notice of entry hereof, upon all parties, and upon the Clerks of the DCM Office (80 Centre Street), Trial Support Office (60 Centre Street), within 30 days.

The foregoing constitutes the decision and order of this court.

Dated: July 10, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
JUL 16 2007
NEW YORK
COUNTY CLERK'S OFFICE