

Xavier v Linden Plaza Hous. Co., Inc.

2008 NY Slip Op 30143(U)

January 18, 2008

Supreme Court, Kings County

Docket Number: 0028325/2005

Judge: Howard Miller

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At an IAS Term, Part 25, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of January 2008.

P R E S E N T:

HON. ROBERT J. MILLER,
Justice

-----X
DAVID XAVIER,

Plaintiff(s),

Index No. 28325/05

- against -

LINDEN PLAZA HOUSING CO., INC. AND
RY MANAGEMENT COMPANY, INC.

Defendant(s).

-----X
LINDEN PLAZA HOUSING CO., INC. AND
RY MANAGEMENT COMPANY, INC.,

Third-Party Plaintiff(s)

Index No. 75215/07

- against -

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT AND DR. JOHN DOE(S)
OR DR. JANE DOE(S), ACTING AS A POLICE
SURGEON TO DAVID XAVIER,

Third-Party Defendant(s)

-----X
The following papers numbered 1 to 4 used on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____ 1-2 _____

Opposing Affidavits (Affirmations) _____ 3 _____

Reply Affidavits (Affirmations) _____ 4 _____

_____ Affidavit (Affirmation) _____

Other Papers _____

Defendants/third-party plaintiffs were represented by Anderson Kill & Olick, P.C., Cary Casmir, Esq. And Jonathan Kromberg, Esq., of counsel. Third-party defendants were represented by Michael A. Cardozo, Corporation Counsel of the City of New York, by Michael Shender, Esq., of counsel.

In this action, third-party plaintiffs Linden Plaza Housing Co., Inc. and Ry Management Company, Inc. (collectively “Linden”) seek to hold the third-party defendants City of New York, New York City Police Department and Dr. John Doe(s) or Dr. Jane Doe(s), acting as a Police Surgeon to David Xavier (collectively the “City defendants”) liable for an injury sustained by a police officer who fell while pursuing a suspect at premises owned by Linden on the theory that a New York City police surgeon negligently cleared for duty a police officer with a chronic knee injury. Linden alleges that assigning plaintiff, a physically infirm police officer, to patrol work was the proximate cause of his injury.

In the underlying action, plaintiff, David Xavier, sued Linden for injuries sustained by him while inside their premises. The City defendants now move for an order, pursuant to “CPLR § 3211(a)(7) and/or CPLR § 3212(b)” dismissing the third-party complaint. The Court will treat the motion as a 3211(a)(7) dismissal motion.

On November 20, 2001, Xavier, a police officer, was injured while pursuing a suspect. Xavier claims that his foot got caught in a broken piece of metal stripping causing him to fall and injure his right knee.

Plaintiff Xavier testified at an examination before trial about two prior line of duty injuries. The first in April, 1993, a knee sprain which kept him out of work for “several weeks” and the second, an injury to his right knee which occurred in November, 1995 when he tripped over a curb. Xavier testified that he “fully recovered in probably two weeks” from the November, 1995 injury, and that he went back to active duty.

Approximately two years after plaintiff’s deposition, Linden instituted this third-party complaint against the New York City defendants.

The third-party complaint alleges, inter alia, as follows:

22. Third-Party Defendants knew of or should have known of plaintiff’s physical condition based on medical and incident reports describing the two accidents dated April 20, 1993 and November, 2005 [sic] where Plaintiff suffered trauma to his right knee.

23. But for the Third-Party Defendants assigning Plaintiff - a physically infirm police officer - to field work with the street crime patrol unit, the alleged injurious event of November 20, 2001 would not have transpired.

24. Third-Party Defendants’ negligent act of assigning Plaintiff, a police officer with a persistent right knee condition, to field work with the street crime patrol unit was the direct and proximate cause of the Plaintiff’s right knee injury of November 20, 2001.

In their dismissal motion, the City defendants argue that the City did not owe a duty of care to Linden. The third-party plaintiffs respond that they have set forth “viable claims for contribution against the City ... viable claims for indemnification against the City based on the City’s breach of its duty” to them and that the City breached the duty it owed to Linden “that

arose from its special relationship with plaintiff.”

Essentially, Linden asks this Court to find that the City is liable to Linden because a police surgeon negligently found the plaintiff fit to return to active duty in 1995 and that this negligent act committed approximately six years before the November 20, 2001 incident is the proximate or direct cause of plaintiff’s injuries.

If the Court were to so find, the potential plaintiffs who could assert claims arising out of discretionary acts performed by City employees would be limitless.

Third-party plaintiffs have failed to demonstrate any of the three essential elements necessary to support their negligence claim: 1) a duty owed by the City to them; 2) a breach of the duty; and 3) that injury resulted from the breach. (See, Solomon v City of New York, 66 NY2d 1026 (1986), Akins v Glen Falls City School Dist., 53 NY2d 325, 333 (1981) citing Prosser, Torts § 30, at 143 [4th ed.]).

With respect to the first element, it is for the Court to determine whether any duty between the City defendants and third-party plaintiffs existed. (See, Pulka v Edelman, 40 NY2d 781 (1976), Darby v Compagnie Nat’l Air France, 96 NY2d 343 (2001).

In making that analysis, Courts balance and review the expectations of parties and society in general and evaluate the impact the imposition of a duty would have on risk allocation and the public policy affecting the extent and limits of liability. (See, Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 232 (2001).)

Here there is no cognizable relationship between third-party plaintiffs landowners and the City defendants. As such, the City did not owe Linden any duty with respect to the City’s discretionary determinations made as to plaintiff Xavier’s fitness to be assigned patrol

work. (See, DiMarco v New York City Health and Hosps. Corp., 187 AD 2d 479, 481 (1992), Balsam v City of New York, 287 AD2d 22 (2001)).

Since no duty existed, there is no need to review the other elements required to support their claim.

Third-party plaintiffs further argue that the City is liable because the City breached the duty owed to them that arose from the City's special relationship with plaintiff.

Here, the City is immune from liability for negligence claims arising from the performance of its governmental role of assigning police officers to patrol work unless the third-party plaintiffs can establish the existence of a special relationship between the injured party and the City (see, Kircher v City of Jamestown, 74 NY2d 251 [1989], Cuffy v City of New York, 69 NY2d 255, 260 [1987], Apostolakis v Centereach Fire Dist., 300 AD2d 516 (2002) and that a duty to Linden arises out of the relationship between the City and its employee Xavier.

The City's relationship with plaintiff Xavier is one of employer-employee. Absent a tortious act by Xavier (and none is alleged here), the City incurs no liability to third parties when it cleared Xavier for duty in the circumstances of this case. Third-party plaintiffs fail to cite any case law which would enable it, a third party to boot strap off the relationship between the City and Xavier to create a duty owing by the City to third-party plaintiffs, owners of the premises where plaintiff fell.

The third-party plaintiffs further argue that because of the special relationship the City has with Xavier, a duty is created from the City to Linden, because it is reasonably foreseeable that a landowner would be harmed by defending a lawsuit. However, even if one were to agree that the City could reasonably foresee that a landowner would be forced to defend a lawsuit since the

City placed an allegedly “unfit for service” employee in a position of being injured, mere foreseeability that an injury may occur does not create a duty. As the Court of Appeals noted in Holdampf v A.C. & S., Inc., 5 NY3d 486, 494 (2005) “foreseeability bears on the scope of duty, not whether the duty exists in the first place.” Here, no duty existed between the City and third-party plaintiffs.

Linden further relies on two cases, Haddock v City of New York, 75 NY2d 478 (1990), McCrink v City of New York, 296 NY 99 (1947), where the City was an employer of a person who committed tortuous acts. In Haddock and McCrink, the City was found liable based on the theory of respondeat superior. This relationship does not exist in this case as the City does not have control over the premises where the accident occurred nor did the plaintiff employee commit any tortuous acts.

Linden also argues that the City owed it a duty of care under the common law theory of indemnification. However, Linden totally fails to establish that the City defendants owed it a duty of care based on a relationship that creates indemnification. They rely on Raquet v Braun, 90 NY2d 177 (1977), where a firefighter was injured while fighting a fire at a premises and the issue was whether the owner of the premises who was ultimately held liable could seek indemnification from contractors who had done work at the site. In Raquet at 183, the Court noted that the “key element for a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather a separate duty owed by the indemnitee to the indemnitor.” Here, the City defendants had no contractual relationship with Linden or control over the premises where the police officer was injured. Therefore, no relationship which would create a duty for indemnification arises. A claim of contribution may

only be asserted if there has been a breach of a duty that runs from the contributor, the City, to the party who may be held liable, Linden. Here no such duty exists. (See, Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559 (1987), Garrett v Holiday Inns, 58 NY2d 253 (1983), Nolechek v Gesuale, 46 NY2d 332 (1978); see also, Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599 (1988)).

Finally, the defendants John Doe or Jane Doe police surgeons owed no duty to third-party plaintiffs landowners. Generally, a physician only owes a duty of care to his or her patients. Courts are correctly reluctant to extend this duty of care to John Q. Public (see, McNulty v City of New York, 100 NY2d 227 (2003), Eiseman v State of New York, 70 NY 2d 175 (1987)). To do so would create a new class of plaintiffs and would totally stretch negligence law beyond all bounds of logic and reason.

The motion to dismiss the third-party complaint is granted and the Clerk of the Court is directed to enter judgment dismissing the third-party complaint with prejudice.

This constitutes the decision and order of the Court..

ENTER,



ROBERT J. MILLER
J.S.C.