Kin Mya Win v Echevarria
2009 NY Slip Op 30111(U)
January 13, 2009
Supreme Court, New York County
Docket Number: 116616/02
Judge: Eileen A. Rakower
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SCANNED ON 1/21/2009

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

PRESENT: RAKOWER
Justice

PART 5

Index Number : 116616/2002

WIN, KHIN MYA

VS.

ECHEVARRIA, ANGEL

SEQUENCE NUMBER : 005

DISMISS

INDEX NO. 116616/02

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4
Answering Affidavits — Exhibits	5, 6
Replying Affidavits	7, 8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/13/09

EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

---X

KIN MYA WIN and TOE OUNG,
Plaintiffs,

Index No.
116616/02

- against -

FILED

DECISION/ORDER
Seq. No.: 005

ANGEL ECHEVARRIA and
THE CITY OF NEW YORK,
Defendants.

JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

---X

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained by plaintiff, Khin Mya Win ("Win"), when she was hit by a car driven by Angel Echevarria ("Echevarria") on East 42nd Street New York, New York on December 14, 2001. Plaintiffs allege that the City of New York ("City") controlled the area of the roadway where Win was hit. Toe Oung, Win's husband, brings a derivative action. City brings this motion for summary judgment seeking to dismiss the complaint, pursuant to CPLR §3212. Plaintiffs oppose and cross move for an order granting leave to amend their notice of claim. Defendant Echevarria opposes City's motion.

City, in support of its motion, submits the following: (1) a copy of this Court's decision dated October 4, 2007 with supporting papers; (2)City's verified amended answer; (3) Win's January 7, 2008 deposition transcript; (4) Win's November 12, 2003 deposition transcript; (5) and the record on appeal of *Shands v. Escalona*, 44 AD3d 524 (1st Dept, 2007).

Plaintiffs, in opposition, submit: (1) Win's affidavit dated September 24, 2008; (2) a photograph of the alleged accident site; (3) the notice of claim; (4) the accident report; (5) a January 6, 2005 case scheduling order; (6) the amended notice of claim; and (7) plaintiffs' amended affirmation in reply to defendant's opposition to plaintiffs' motion to amend the notice of claim. Echevarria adopts plaintiffs' opposition.

On December 14, 2001, at the site where Win was injured, a team of City police officers and sanitation workers had been assigned to set up a blockade to restrict

access to the U.N. building. Win asserts that, after being told by a City sanitation worker that she could cross the street, which was blocked to vehicular traffic by two sanitation trucks, she was hit by Echevarria's car. Echevarria's vehicle was permitted to drive eastbound through the barrier into the westbound lanes and on the wrong side of the street by the barrier team, without warning to Win. Win contends that she entered the roadway relying on the sanitation worker's assurance of safety.

As a thresh hold issue, plaintiffs and Echevarria urge that the issue of City's entitlement to summary judgment was already adjudicated in this Court's prior decision. However, the prior decision found only that plaintiffs had shown a meritorious claim for the purposes of restoring the case to the trial calendar. In its previous decision, dated October 4, 2007, this Court found plaintiffs to have established a meritorious claim against the city based solely on Win's affidavit, "viewing the affidavit of Ms. Win as true." Win alleged there was direct contact between her and a city sanitation worker and that she relied on that worker's statement that it was safe to cross a street blockaded by sanitation trucks. The prior motion also sought to amend the pleadings, which resulted in this Court granting the amendment, noting that such amendment necessitated further discovery, vacating the note of issue and ordering that City be given the opportunity to depose Win regarding her new allegations. Within the context of that motion, and at a point when discovery was not completed, no party was required to lay bare their proof, establishing that there was or was not an issue of fact to be determined by the jury. Absent a full opportunity to litigate the issues, the parties shall not be collaterally estopped from litigating those issues within this motion.

Plaintiffs, in their cross-motion, seek to amend their notice of claim, in order to allege a special relationship with the City. Plaintiffs point out that such special relationship was already alleged in their amended pleadings, presenting no new facts nor a new legal theory.

General Municipal Law §50-e(6) states:

> At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by

> this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

City argues that it would be prejudiced were plaintiffs permitted to amend the claim. However, City conducted an investigation immediately after the accident and the amended notice merely amplifies the facts stated in the original notice. The theory of a special relationship is alluded to, albeit, indirectly: "failure to warn pedestrians of the opening of a barricade, negligent direction of traffic, creation of a trap, creating a safety zone and directing traffic into it ..." (*See Wanczowski v. City of New York*, 186 AD2d 397 [1st Dept. 1992]). Thus, City would not be surprised or prejudiced by the amendment.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Generally, a municipality is immune from a negligence action if the conduct complained of involves the exercise of professional judgment. (*Kenavan v. City of New York*, 70 N.Y.2d 558[1987]). To hold the City liable for the negligent performance of a discretionary act, a plaintiff must establish a special relationship with the municipality. (*Kovit v. Hallums*, 4 N.Y.3d 499[2005]). Establishing a special relationship based on a municipality's assumption of a duty requires: (1) an assumption by a municipality, through promises or actions, to act on behalf of the injured party; (2) knowledge on the part of a 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 reliance on the municipality's affirmative

undertaking. (*Pelaez v. Seide*, 2 N.Y.3d 186[2004]).

At her January 7, 2008 deposition, Win testified that, as she was crossing Second Avenue within the crosswalk, she saw "cement block and metal barriers, wooden, and policeman and big two trucks." She one man standing beside the open door of one truck and another man inside. The metal and wooden barriers were blocking the crosswalk. Win further stated that the man who had been standing by the truck, moved in her direction and began "moving barriers." She recounted the following conversation:

Q: Did you speak to this man?

A: Yes.

Q: Did he speak to you first or did you speak to him first?

A: I speak to him first.

Q: What did you say to him?

A: I say, is it okay to go back of the truck to cross the road.

Q: And what did he say?

A: He said okay. He said okay, okay, the street is closed.

. . .

Q: And so is that everything that you said to each other?

A: Yes.

Q: And then what did you do?

A: I walked down the two trucks and crossed. Looked both sides and then crossed.

Q: Are you telling me that you walked east on 42nd Street until you were past where the trucks were?

A: East means this side, this way (indicating)?

Q: Yes.

A: Yes, east and then I passed the two trucks and then crossed the road.

Investigation did not reveal the identity of the man who is alleged to have spoken with Win and who was moving the metal and wooden barriers. Assuming that Win did have direct contact with a sanitation worker, she fails to satisfy all prongs of the special relationship test. (see generally, *Palaez*). There is no evidence that the sanitation worker affirmatively assumed a duty to act on Win's behalf. Further, there is no indication that the sanitation worker knew that his inaction could lead to harm. Thus, the relationship Win attempts to establish through the conversation recounted above, which encompasses the totality of the contact between Win and City, falls short of showing a special relationship which would entitle Win to bring a private right of action against City. Wherefore it is hereby

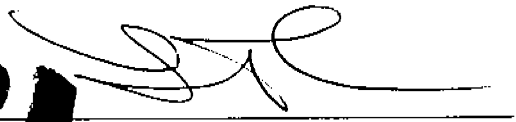
ORDERED that cross-motion to amend the notice of claim is granted and the amended notice of claim in the proposed form annexed to the moving papers shall be deemed served and filed; and it is further;

ORDERED that the motion is granted and the complaint is hereby severed and dismissed as against defendant the City of New York, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-city part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court. All other relief requested is denied.



DATED: January 13, 2009

EILEEN A. RAKOWER, J.S.C.

JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK