

Kelly v Giuliani

2009 NY Slip Op 32044(U)

August 13, 2009

Supreme Court, Richmond County

Docket Number: 13476/01

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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KELLY, PATRICIA M. Individually and as Administratrix
of/for JOHN M. KELLY [Deceased July 17, 2000] and
PATRICIA M. KELLY, aas Mother and Natural Guardian
of SEAN PATRICK KELLY [DOB 8/16/97] And
CHRISTOPHER THOMAS KELLY [DOB 10/29/99]
Infant-sons of the decedent JOHN M. KELLY,

Part C-2
Present:
Hon. Thomas P. Aliotta

Plaintiffs,

-against-

DECISION AND ORDER

RUDOLPH GIULIANI, MAYOR OF THE CITY OF
NEW YORK, THE CITY OF NEW YORK, THE NEW
YORK CITY GENERAL SERVICES ADMINISTRATION
AGENCY, POLICE COMMISSIONER HOWARD SAFIR
and THE NEW YORK CITY POLICE DEPARTMENT.

Index No. 13476/01
Motion No. 356-008

Defendants.

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The following papers numbered 1 to 3 were marked fully submitted on the 6th day of May, 2009:

Papers	Numbered
Notice of Motion for Summary Judgment by Defendants Rudolph Giuliani, Mayor of the City of New York, The City of New York, The New York City General Services Administration Agency, Police Commissioner Howard Safir and The New York City Police Department, with Supporting Papers and Exhibits (dated January 30, 2009).....	1
Affirmation in Opposition by Plaintiffs with Exhibits (dated June 13, 2009).....	2
Reply Affirmation (dated June 22, 2009).....	3

Upon the foregoing papers, the motion of defendants for summary judgment is granted in all respects.

This is an action to recover monetary damages arising from the death of plaintiffs' decedent in an automobile accident.

Defendants collectively move for summary judgment dismissing the complaint pursuant to CPLR 3211 and 3212 on the grounds that: (1) in the absence of any special relationship with plaintiffs or decedent, the City is immune from liability for its discretionary acts; (2) plaintiffs have failed to comply with General Municipal Law sections 50-e, 50-i(1)(a) and 50-i(1)(b) in that they failed to serve a timely Notice of Claim or plead that at least thirty days had passed since such service; (3) no claim for punitive damages lies against a municipality; (4) the complaint fails to set forth any factual or legal basis for a claim against Mayor Rudolph Giuliani or Police Commissioner Howard Safir.

In opposition, plaintiffs rely on the affirmation of their attorney, who (1) questions the City's exercise of its discretion and the validity of the research upon which it allegedly relied in the exercise of that discretion, and (2) argues that there is a question of fact as to whether the City's exercise of its discretion was a proximate cause of the accident.

The material facts in this action are not subject to serious dispute.

On the date of the accident, July 17, 2000, plaintiffs' decedent, John M. Kelly, was a police officer assigned to the Staten Island Auto Larceny Unit. Officer Kelly was an eight-year veteran of the department and had been assigned to the unit for just over four years.

According to the accident investigation report, prepared by the New York City Police Department on the date of the accident, Officer Kelly began pursuit of an apparently-stolen motorcycle in the westbound lane of the Staten Island Expressway just beyond the overpass for the West Shore Expressway. The vehicles proceeded west on the Staten Island Expressway, exiting at Western Avenue, turning left on Western Avenue, going underneath the Goethals Bridge and continuing south along Gulf Avenue to a point 3/10ths of a mile south of Forest Avenue where Officer Kelly's vehicle, traveling at 77.2 miles per hour, apparently skidded and yawed, hitting one pole and spinning into another. Officer Kelly later died of the injuries received in the crash. The motorcyclist fled the scene, but was later apprehended and prosecuted.

Plaintiffs served a Notice of Claim on January 18, 2001 (more than ninety days after the incident, but less than 90 days after the appointment of Officer Kelly's widow as administratrix of his estate), alleging that Officer Kelly was killed in the line of duty while operating his assigned police department vehicle, a 1999 GM Lumina, which was inappropriate for its intended use in law enforcement.

The first three Causes of Action in the Verified Complaint, filed on October 9, 2001 allege that defendants' negligence in assigning a vehicle unsuitable for its intended use resulted in the personal injury and wrongful death of Officer Kelly, along with plaintiffs' collective loss of consortium. A fourth "Cause of Action" in the complaint seeks punitive damages in the amount of \$250 million.

In support of their motion for summary judgment, defendants present, inter alia, the affidavit of Carl M. Chiaramonte, the Administrative Director of Fleet Maintenance in the Fleet Services Division of the New York City Police Department. From October 10, 1989 through November 20, 2000, which period encompassed the date of Officer Kelly's accident, Mr. Chiaramonte's duties included "preparing specifications; researching different vehicles that the NYPD was interested in obtaining for its fleet; and instituting the warranty program that the NYPD currently uses." Among the vehicles Mr. Chiaramonte evaluated for the NYPD was the 1999 Chevrolet Lumina.

In making his evaluations, Mr. Chiaramonte followed the protocols established by the NYPD for fleet selection. As outlined by Mr. Chiaramonte, the process involved research and preparation of specifications based on the needs of the Department. It included his review of the *1999 Chevrolet Police and Special Services Vehicle* specifications catalogue provided to the NYPD by Chevrolet Motor Division, which set forth the specifications and specialty equipment available for police use of Chevrolet vehicles, including the 1999 Lumina. It also included his review of the evaluations of the vehicles under consideration which were performed by the National Law Enforcement and Corrections Technology Center (NLECTC) of the National Institute of Justice, U.S. Department of Justice; the Michigan State Police Training Division; and Independent Testing and

Consulting, Inc.¹

For the 1999 model year, the NLECTC evaluated 13 vehicles in a battery of competitive tests, which included vehicle dynamics testing designed to “determine each vehicle’s high-speed pursuit or emergency handling characteristics and performance.”² Additional tests evaluated a vehicle’s acceleration, top speed, braking characteristics, ergonomics, communications and fuel economy.

Based on his review and analyses of the *1999 Model Year Patrol Vehicle Testing* report from the U.S. Department of Justice and the *1999 Chevrolet Police and Special Services Vehicle* specifications catalogue, Mr Chiamonte found nothing negative about the 1999 Lumina, and advised the Fleet Services directors of the results of his research.

The directors of Fleet Services and the NYPD Chief of Patrol made the final decision to purchase the 1999 Chevrolet Lumina. Following the required bidding process, based on the specifications prepared by Mr. Chiamonte, the City of New York purchased two hundred fifty-nine 1999 Chevrolet Lumina for use in all NYPD commands except Highway Patrol.³

The subject vehicle was assigned to the Staten Island Auto Larceny Unit on or about October

¹ The NLECTC supervises a national compliance testing program, the Law Enforcement and Corrections Standards Testing Program, which is conducted by independent laboratories. “The standards developed by the Office of Law Enforcement Standards (OLES) serve as performance benchmarks against which commercial equipment is measured. The facilities, personnel, and testing capabilities of the independent laboratories are evaluated by OLES prior to testing each item of equipment. In addition, OLES helps NLECTC staff review and analyze data. Test results are published in consumer product reports designed to help justice system procurement officials make informed purchasing decisions” (*1999 Model Year Patrol Vehicle Testing*, U.S. Department of Justice, February 1999, p.ix [Exhibit 3 to Affirmation in Support of Elizabeth Gross, Esq., dated January 30, 2009]). Analyses of the test results presented in the report do not represent approval or endorsement of the vehicles or equipment by the respective testing agencies (id., p.ii).

² To determine a vehicle’s dynamics, each vehicle was driven over a test course for at least 12 timed laps, using a minimum of three separate drivers. According to the report: “The course used was a 1.635-mile road-racing type configuration containing hills, curves and corners. The course simulates actual conditions encountered in pursuit or emergency driving situations in the field, with the exception of other traffic. The evaluation will be a true test of the success or failure of the vehicle manufacturers to offer vehicles that provide the optimum balance between handling (suspension components), acceleration (usable horsepower) and braking characteristics” (id. p.26).

³ Police Officer Robert D’Allegro, a training officer with the Highway Division, testified at his deposition that the 1999 Lumina was not selected for use by the Highway Patrol Unit. At the request of his supervisor, and using his own personal criteria, which differed from the Department of Justice 1999 Model Year Vehicle Testing program, Officer D’Allegro tested a newly-purchased Lumina and determined that it was not suitable for use by the Highway Patrol. Rather, he opined that rear-wheel drive vehicles, with V-8 engines, higher clearance and larger trunks were more suitable for highway use. In addition, he thought that “the handling characteristics at high speeds are superior with rear-wheel drive cars as opposed to front-wheel drive cars [such as the Lumina]” (Deposition, dated August 4, 2005, p. 100 ff, p. 145). Thus, although the Lumina was able to perform the test exercise with an experienced driver, it was Officer D’Allegro’s opinion that he would have to retrain the highway patrolmen to properly handle a front-wheel drive vehicle on the highway.

19, 1999. It remained in service with that unit until the date of the accident. According to NYPD Fleet Services records, the vehicle was regularly maintained during that period, and no complaints concerning the handling of 1999 Chevrolet Lumina vehicles in general, or the subject vehicle in particular, were received by the Fleet Service maintenance department.

Based on the uncontroverted facts presented, it is clear to the Court, as a matter of law, that the City has made a prima facie showing that it was not negligent in the selection of the subject vehicles, *i.e.*, it has established that it had a reasonable, non-negligent, basis for its decision to purchase the fleet. Defendants thus have met their burden on this motion for summary judgment (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Moreover, it cannot be gainsaid that the decision to purchase a fleet of 1999 Lumina vehicles for use by NYPD commands other than the Highway Division constituted an action within the permissible discretion of defendants (*see e.g. Amodio v City of New York*, 33 AD3d 456, 457 [1st Dep't 2006]). It is well-settled that a municipality is not liable to an injured party for its discretionary acts, *i.e.*, conduct involving the exercise of reasoned judgment, even if the conduct is negligent (*Kovit v Estate of Hallums*, 4 NY3d 499 [2005]). Thus, under the circumstances presented here, "the City cannot be subjected to tort liability for its decision . . . as that decision constituted a discretionary act involving the exercise of reasoned judgment" (*Heckel v City of New York*, 60 AD3d 812, 813 [2nd Dep't 2009], *lv denied* 12 NY3d 712).

Thirdly, even if it was assumed that the City was negligent in the selection and assignment of the vehicles to the Auto Larceny Unit, plaintiffs raise no question of fact whether such negligence, if any, was the proximate cause of the accident. There is no evidence whatsoever as to what caused the 1999 Lumina to leave the roadway and crash during the high-speed chase (*Sosa v City of New York*, 281 AD2d 469 [2nd Dep't 2001]). To argue, as does plaintiffs' counsel in his affirmation in opposition, that the asserted negligence of the City was a substantial factor in bringing about this tragic accident is only to invite impermissible speculation (*Murray v. State*, 38 NY2d 782 [1975]). In this regard, the Court notes that counsel is without personal knowledge of the facts, and points to no substantive evidence, such as an expert opinion, to substantiate his accusation. To that extent, plaintiffs' opposition is without probative value (*Zuckerman v. City of New York*, 49 NY2d at 560).

Once a defendant has established its right to judgment as a matter of law, the burden shifts to plaintiffs to establish, by admissible proof, the existence of genuine issues of fact (*Zuckerman v. City of New York*, 49 NY2d at 562). That is, defendants must "assemble, lay bare and reveal [their] proofs in order to show that the allegations in the complaint are real and capable of being established upon a trial" (*Manculich v. Dependable Auto Sales and Service Inc.*, 39 AD3d 1070 [3rd Dep't 2007]). It is the existence of these factual issues, not the asynaptic speculations of counsel, that must be established. Plaintiffs' failure to do so here is fatal to their opposition.

The City defendants having made a prima facie showing of their entitlement to judgment as a matter of law by establishing that: (1) the decision to purchase a fleet of 1999 Luminas for use in NYPD commands other than the Highway Division was a protected exercise of governmental discretion; (2) there is no evidence that the vehicle assigned to Officer Kelly at the time of his death was defective or unsuitable for the use intended when the City selected it for use by the Auto Larceny Unit; and (3) the administrative decision to purchase the 1999 Lumina fleet was not a proximate cause of the accident; and plaintiffs, in opposition, having failed to demonstrate the existence of a triable issue of fact, the motion for summary judgment is granted and the complaint is dismissed (*see e.g. McLean v City of New York*, 12 NY3d 194, 202 [2009], holding that "discretionary municipal acts may never be the basis for liability;" and *Goode v City of New York*, 15 AD3d 440, 441 [2nd Dep't 2005], holding that plaintiff had failed to raise a question of fact whether the City's design and maintenance of a roadway was a proximate cause of her injuries).

