

Abreu v Filippone

2009 NY Slip Op 32902(U)

December 4, 2009

Supreme Court, Suffolk County

Docket Number: 06-29968

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

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P R E S E N T :

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-15-09
ADJ. DATE 8-27-09
Mot. Seq. # 001 - MG
002 - XMG

-----X		JAKUBOWSKI, ROBERTSON, MAFFEI, et al.
KELVIN ABREU, an infant over the age of	:	Attorneys for Plaintiffs
fourteen, by his mother and natural guardian	:	969 Jericho Turnpike
ANGELITA M. NUNEZ, and ANGELITA M.	:	St. James, New York 11780
NUNFZ, individually,	:	
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	:	
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	:	
	:	CHRISTINE MALAFI, ESQ., Suffolk Cty Attorney
	:	By: Diana T. Bishop, Esq..
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-----X		

Upon the following papers numbered 1 to 88 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30; Notice of Cross Motion and supporting papers 31 - 58; Answering Affidavits and supporting papers 59 - 81; 82 - 83; Replying Affidavits and supporting papers 84 - 85; 86 - 87; Other memorandum of law, 88; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the Board of Fire Commissioners of the Copiague Fire District, the Copiague Fire District, and the Copiague Fire Department for summary judgment, pursuant to CPLR 3212, is granted; and it is further

ORDERED that the cross-motion by the County of Suffolk and the Suffolk County Police Department, for summary judgment, pursuant to CPLR 3212, is granted; and it is further

ORDERED that this action is severed and continued against defendant Stephanie Filippone.

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On November 5, 2005, infant plaintiff Kelvin Abreu was riding his bicycle on Cabota Avenue in Copiague, New York, when he was struck by a motor vehicle driven by defendant Stephanie Filippone. Subsequently, his mother, plaintiff Angelita Nunez, suing individually and on behalf of her son, commenced this action against defendants. Plaintiffs allege in their complaint that defendants County of Suffolk, Suffolk County Police Department, the Board of Fire Commissioners of the Copiague Fire District, and the Copiague Fire Department were negligent and reckless in their supervision and management of traffic after a motor vehicle accident, and that such negligence proximately caused defendant Filippone's vehicle to strike the infant plaintiff's bicycle. Defendant Filippone asserts cross-claims against the co-defendants alleging that the infant plaintiff's injuries were caused by their negligence.

Defendants the Board of Fire Commissioners of the Copiague Fire District and the Copiague Fire Department (hereinafter collectively known as "Fire Department") now move for summary judgment dismissing plaintiffs' claims, arguing that they did not owe a special duty to the infant plaintiff, and that there is no evidence that they violated any of their rules, regulations, or guidelines. In support thereof, they submit a copy of the pleadings, the infant plaintiff's medical records, copies of the police accident report, and transcripts of the deposition testimony of police officers Michael Koubek and Michael Turansky. They also submit transcripts of the deposition testimony of the infant plaintiff, defendant Filippone, and Arthur Steigert, a fire chief.

Defendants County of Suffolk and the Suffolk County Police Department (hereinafter collectively known as "the County") cross-move for summary judgment dismissing plaintiffs' claims, arguing that there was no special duty between the Police Department and the infant plaintiff, that it did not assume a duty to protect the infant plaintiff, and that it is entitled to absolute government immunity for discretionary acts. The County's submissions in support of the cross-motion include, among other things, a copy of the pleadings, and transcripts of deposition testimony of the infant plaintiff, plaintiff Angelita Nunez, Officer Koubek, Officer Turansky, Officer Edmond McDowell, and defendant Filippone. They also submit photographs of the subject accident scene and copies of the police accident report.

Plaintiffs oppose the motion by the Fire Department and the cross-motion by the County, arguing that in certain circumstances a municipality may still be liable even if there is no special relationship between the plaintiff and the municipality. In support thereof, plaintiffs submit, among other things, the pleadings, copies of the police accident report, a transcript of the deposition testimony of the parties, and copies of the infant plaintiff's medical records. Defendant Filippone also opposes the motion and cross-motion by her co-defendants.

At his examination before trial, Michael Koubek, a Suffolk County Police Officer, testified that dispatch notified him of a motor vehicle accident involving an overturned vehicle on Dixon Avenue. He testified that Dixon Avenue in Copiague, New York, runs east and west, and has two lanes of travel in each direction, as well as a center turn lane. He testified that when he arrived at the accident scene, he parked his vehicle perpendicular to Dixon Avenue to block eastbound traffic on Dixon Avenue. He

further testified that he was in charge of the accident scene in terms of controlling the direction of traffic and travel. Officer Koubek testified that prior to the accident involving plaintiff, no one from the Fire Department was directing traffic. He testified that Officer McDowell placed cones and flares on the eastbound lanes of Dixon Avenue between Verrazano Avenue and Cabota Avenue. He further testified that fifteen minutes after arriving at the accident scene, he heard a motor vehicle skidding and a “thump,” and later learned that defendant Filippone’s vehicle had collided with plaintiff, who was riding his bicycle.

At his examination before trial, Officer Edmond McDowell testified that when he arrived at the first accident, he used his vehicle to block eastbound traffic on both lanes of Dixon Avenue between Verrazano Avenue and Cabota Avenue. He testified that he also placed cones and flares across the lanes of Dixon Avenue to prevent eastbound traffic from entering. He further testified that vehicles were allowed to travel westbound on Dixon Avenue at the location of the accident. Officer McDowell testified that he observed pedestrians walking on the sidewalk near the accident scene, and that he put up police tape to prevent them from entering that area. He testified that he observed the infant plaintiff riding his bicycle across the eastbound lanes of traffic on Dixon Avenue. He testified that the infant plaintiff’s bicycle passed behind the rear of an ambulance, and then was struck by defendant’s vehicle.

At his examination before trial, Arthur Steigert testified that at the time of the subject accident he was chief of the Copiague Fire Department, and that traffic at an accident scene is generally the responsibility of the police department. He testified that when he arrived at the first accident scene he parked his vehicle in the center turn lane on Dixon Avenue. He testified that the subject accident between plaintiff and defendant Filippone occurred on the westbound lane of Dixon Avenue.

At her examination before trial, defendant Filippone testified that she was familiar with the area where the subject accident occurred, as she drove through that area frequently. She testified that she was traveling thirty miles per hour at the time of the accident. She testified that as she was traveling in the left westbound lane of Dixon Avenue, she observed the accident scene. She testified that she saw “two Explorer fire trucks, and an ambulance in the center turning lane,” and that the accident scene was closed off with tape. Filippone testified that as she passed the emergency vehicles, a bicyclist came out from behind the ambulance, and her vehicle struck the bicyclist. She further testified that prior to the subject accident she did not observe any cones or flares at the accident scene, and that there was no one directing traffic.

At his examination before trial and 50-h hearing, plaintiff testified that he was riding his bicycle from his brother’s house and intended to return home. He testified that he was not wearing a helmet, and that he does not remember the events that occurred after he left his brother’s house.

Traffic regulation, including the placement of road flares, is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to general police powers (*see Eckert v State of New York*, 3 AD3d 470, 771 NYS2d 132 [2004]). A municipality may not be liable for discretionary acts of a municipal or public employee absent a special relationship between the plaintiff

and the municipality (see *McLean v City of New York*, 12 NY3d 194, 905 NE2d 1167 [2009]; *Garrett v Holiday Inns*, 58 NY2d 253, 447 NE2d 717 [1983]).

The four elements that are required to establish a special relationship are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of a 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 (see *Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20 [2005]). Absent such a showing, "the proper allocation of public resources and available police services is a matter for the executive and legislative branches to decide" (*De Long v County of Erie*, 60 NY2d 296, 469 NYS2d 611 [1983]). The special duty rule is limited in cases involving nonfeasance, where the municipality is alleged to have failed to take any action in breach of some general duty imposed by law or voluntarily assumed for the benefit of the public as a whole (*Rodriguez v City of New York*, 189 AD2d 166, 595 NYS2d 421 [1993]).

Here, the conduct of the police officers, including placement of road flares, cones, and tape at the accident scene, constituted a government function (see *Eckert v State of New York*, *supra*; *Repass v City of New York*, 288 AD2d 286, 733 NYS2d 210 [2001]). The County made a *prima facie* showing of entitlement to summary judgment by demonstrating that a "special relationship" did not exist between the municipality and the infant plaintiff (see *Kenavan v New York*, 70 NY2d 558, 517 NE2d 872 [1987]; *Santoro v City of New York*, 17 AD3d 563, 795 NYS2d 60 [2005]).

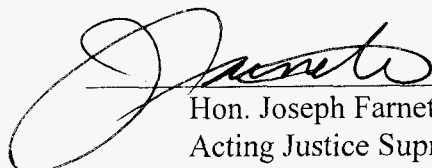
In opposition, plaintiffs failed to establish the elements of a special duty (see *Gonzalez v County of Suffolk*, 228 AD2d 411, 643 NYS2d 651 [1996]; *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372 [1987]). Under the circumstances, there was no special relationship between plaintiffs and the County as there was no direct contact between the Police Department personnel with the infant plaintiff prior to his accident, and there was no justifiable reliance by the infant plaintiff (see *Repass v City of New York*, *supra*; *Cuffy v City of New York*, *supra*; *Merced v City of New York*, *supra*). The evidence demonstrates that any alleged negligence of the County in directing traffic merely set the scene for the second accident, but was not the proximate cause of the accident (see *Saviano v City of New York*, 5 AD3d 581, 774 NYS2d 82 [2004]). Moreover, tort suits that test the course of action undertaken by the police in furtherance of public safety are disfavored because they implicate choices about the allocation of finite police resources that are better left to the discretion of the policy makers (see *Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 665 NYS2d 613 [1997]). Accordingly, the cross-motion by the County for summary judgment dismissing the action against it is granted.

As to defendant Fire Department, section 205-b of the General Municipal Law provides as follows: "Members of duly organized volunteer fire companies in this state shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firemen, except for wilful negligence or malfeasance." Here, defendant Fire Department has made a *prima facie* showing of entitlement to summary judgment by demonstrating that it was not wilfully negligent in its duties at the

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subject accident scene. The deposition testimony of Steigert, the fire chief, and of the police officers, demonstrate that the Fire Department personnel were not involved with directing traffic during the subject accident and that it was not their responsibility to do so. In opposition, plaintiffs failed to come forward with any evidence to support the claim of wilful negligence or malfeasance as to the conduct of defendant Fire Department (see *O'Leary v Greenport Fire Dep't*, 276 AD2d 539, 714 NYS2d 451 [2000]). Accordingly, the motion by defendant Fire Department for summary judgment dismissing the complaint against it is granted. The action is severed and shall continue against the remaining defendant, Stephanie Filippone.

Dated: December 4, 2009



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION