[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 101129/2002

ROBIOU, MARIA ACOSTA

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

Cal # 19

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits cross-motion	2
Replying Affidavits	3, 4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUN 29 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/23/10

JUN 23 2010

BJ

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

----------x

MARIA ACOSTA ROBIOU,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 101129/02

Motion Date: 3/26/10 Motion Seq. No.: 002
Motion Cal. No.: 104
Motion Argued: 5/11/10

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Steven I. Brizel, Esq.
Raymond Schwartzberg & Associates, PLLC
60 East 42nd St., Ste. 1166
New York, NY 10165
212-687-1737

For defendant:
Andrew Lucas, ACC
Michael A. Cardozo
Corporation Counsel
Manhattan Trial Unit, Tort Div.
100 Church St., 4th Fl.
New York, NY 10007-2601
212-442-6855

By notice of motion dated February 22, 2010, defendant City of New York (City) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes the motion and, by notice of cross-motion dated March 11, 2010, moves for an order striking the City's answer for its failure to comply with discovery orders and denying City's motion for summary judgment.

I. BACKGROUND

Plaintiff alleges that on June 20, 2001, at approximately 2 a.m., City's Fire Department responded to a fire at an apartment building located at 515 West 156th Street in Manhattan, where she was the superintendent. (Affirmation of Andrew Lucas, ACC, dated Feb. 22, 2010 [Lucas Aff.], Exh. A). Firefighters asked plaintiff to direct them to the rear of the building, and as she

did so, she was struck by pieces of glass which fell from a window that had been broken by other firefighters on the building's fifth floor. (*Id.*).

On or about August 6, 2001, plaintiff served her notice of claim on City, in which she alleged that City was negligent in failing to warn and protect her from a dangerous condition which it caused or created or permitted to exist. (*Id.*).

On January 8, 2002, plaintiff testified at a 50-h hearing that on June 20, 2001, firefighters came to her apartment and asked for her help, that she went with them to the yard behind the building, that she was wearing a house coat, pajamas, and slippers, that a fireman asked her to show him where the back fire escapes were located, that while she was standing in the yard after showing him the escapes, glass suddenly fell down on her, and that the fireman then told her to go back to her apartment since she was not wearing any protection. (*Id.*, Exh. B).

On January 16, 2002, plaintiff served her summons and complaint, in which she repeated the same allegations, and on April 2, 2002, City filed its answer. (*Id.*, Exhs. C, D).

On March 25, 2009, Captain Thomas Hughes testified at a deposition that in 2001 he was employed as the lieutenant for Fire Department Engine 84, that he had a vague recollection of responding to the June 2001 fire, that he had no contact with any tenants at the building, that it was not his duty to find out where the fire escapes were located, and that it was not his fire company's responsibility to break windows in the building in order to vent it. (*Id.*, Exh. G).

II. CITY'S MOTION FOR SUMMARY JUDGMENT

A. Contentions

City argues that as firefighting is a governmental function, it is not liable for any breach resulting therefrom absent a special duty owed to the plaintiff, that plaintiff was not owed a

special duty, and that, in any event, plaintiff failed to allege in her notice of claim and complaint a theory of liability based on special duty, thereby waiving it. (Lucas Aff.).

Plaintiff contends that City has only produced one witness for a deposition, someone with limited knowledge of the pertinent firefighting procedures and facts, along with a single document. It thus asserts that further discovery, including depositions of the firefighters who spoke to plaintiff and were present on the date of the accident, will establish that City assumed a special duty to plaintiff as she aided the firefighters in locating and extinguishing the fire and thus, reasonably believed that they would protect her from any resulting harm. She argues that she adequately pleaded her theory of liability in her notice of claim and complaint, and does not dispute that she must establish that a special duty existed in order to prevail on her claim against City.

In reply, City asserts that plaintiff only pleaded regular negligence, observes that plaintiff neither alleged nor testified that the firefighters specifically promised her protection, and denies that by asking for plaintiff's assistance, City assumed a special duty toward her. (Reply Affirmation of Andrew Lucas, ACC, dated May 4, 2010).

B. Analysis

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has

the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

Before liability for negligence may be imposed, the plaintiff must demonstrate: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; and (3) that the plaintiff was injured as a result of the breach. (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]).

A municipality may be held liable in negligence when the duty allegedly breached is for the benefit of a particular person or class, rather than the general public. (*McLean v City of New York*, 12 NY3d 194 [2009]). Such a duty may arise from a special relationship, as established by proof of: (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) that party's justifiable reliance on the municipality's affirmative undertaking. (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). As the plaintiff bears a "heavy burden" of establishing the existence of a special relationship,

many claims are summarily dismissed. (*Pelaez v Seide*, 2 NY3d 186, n 8 [2004]).

1. Did plaintiff plead a special duty or relationship?

Plaintiff did not use the phrase "special duty" or "special relationship" in either her notice of claim or complaint. Rather, she alleged that City, after requesting her assistance in investigating the fire, failed to warn or protect her from a dangerous condition, and did not allege that City promised to protect her or took any action to protect her, that City knew that any failure on its part could lead to harm, or that she justifiably relied on City's promise to protect her. She has thus failed to plead all of the elements of the "special duty" exception. (*See Abraham v City of New York*, 39 AD3d 21, 26-27 [2d Dept 2007], *lv denied* 10 NY3d 707 [2008] [plaintiffs failed to plead that city knew that inaction would lead to harm]; *Brown v City of New York*, 22 AD3d 241 [1st Dept 2005] [complaint dismissed absent allegation therein justifying inference of special relationship between plaintiff and defendant]; *Burger v County of Onondaga*, 272 AD2d 965 [4th Dept 2000], *lv denied* 95 NY2d 760 [defendant entitled to dismissal of complaint as plaintiff failed to plead justifiable reliance; defendant did not convey, directly or indirectly, any promises of protection or assistance]).

2. Are there triable issues as to special duty?

Assuming that the allegations set forth in the notice of claim and complaint are sufficient to justify an inference that City assumed a special duty toward plaintiff, plaintiff offers no evidence demonstrating that the firefighters promised her protection when they asked for her assistance in locating the fire escapes. Even if it may be inferred that the firefighters would not have exposed plaintiff to harm, there is no proof that they specifically promised her that she would be safe or that they would protect her.

Similarly, in *Lynch v State*, a tow truck operator was called to remove a disabled vehicle from a highway, and a state trooper temporarily stopped traffic to allow the operator to pull in front of the car. (37 AD3d 772 [2d Dept 2007]). The trooper then told the operator that it was "okay" for him to hook up the vehicle, and when he did so, he was hit by oncoming traffic. The court dismissed the claim, finding that a special relationship did not exist as the evidence showed that the trooper did not, through promises or actions, voluntarily assume a duty to protect the operator. (*See also Khalil v Guardino*, 300 AD2d 360 [2d Dept 2009] [assuming officer told decedents to get off train tracks, statement did not constitute promise of safety, nor did officer promise that he would protect them from harm]).

Even where a party is directed or instructed by the municipality or its agents to take or refrain from taking some action, rather than being asked to do something, it has been held that the City does not assume any duty absent a specific promise of protection. In *Labriola v City of New York*, the plaintiff was injured after he left the street where a fireworks display had been set up to walk on the sidewalk as directed by the police. (129 AD2d 505 [1st Dept 1987], *lv denied* 70 NY2d 604). The court dismissed the claim, finding that the police made no specific promise to plaintiff as "a simple demand by the police to get on the sidewalk does not amount to the promise of safety . . ." (*Id.*).

In *Maslowski v H.J. Kalikow & Co., Inc.*, the plaintiffs were injured after police officers had directed them to stand on a sidewalk under a pedestrian bridge, which then collapsed on them. The court found that the officers' direction "did not amount to a promise of safety." (168 AD2d 265 [1st Dept 1990]). And in *Elie v Gayle*, after the plaintiff's vehicle collided with another vehicle and became disabled, municipal employees asked him to demonstrate why he

was unable to move his vehicle, and when he walked into the street to do so, his vehicle was hit and he was injured. The court found that other than the contact between plaintiff and the employees, none of the other elements of a special relationship existed. (9 Misc 3d 131[A], 2005 NY Slip Op 51588[U] [App Term, 2d & 11th Jud Dists 2005]; *see also Davis v New York City Transit Auth.*, 63 AD3d 990 [2d Dept 2009] [officer's instruction to plaintiff that he not go into subway car was not assumption of affirmative duty to protect him]).

Here, not only was plaintiff not directed or instructed to lead the firefighters to the fire escape, but even if she had been so directed, absent any specific promise of protection, the firefighters assumed no duty to protect her.

Moreover, it is plaintiff's burden to show that she justifiably relied on the firefighters to protect her, that their "conduct actually lulled her into a false sense of security, induced her either to relax her own vigilance or forego other avenues of protection, and thereby placed her in a worse position than she would have been had the [defendant] never assumed the duty." (*Brown v City of New York*, 73 AD3d 1113 [2d Dept 2010]). As plaintiff offered no evidence that the firefighters promised or took any steps to protect her, she could not have been lulled into a false sense of security. (*See Dinardo v City of New York*, 13 NY3d 872 [2009] ["the assurance by the municipal defendant must be definite enough to generate justifiable reliance by the plaintiff."]; *Euell v Inc. Village of Hempstead*, 57 AD3d 837 [2d Dept 2008] [plaintiff did not rely on any promise of protection by defendant]; *Burger*, 272 AD2d at 965 [same]). Rather, the facts proven demonstrate that nothing prevented plaintiff from leaving the yard after she showed the firefighters the location of the fire escapes.

Finally, plaintiff must also establish that the firefighters knew that their inaction could

lead to harm, which requires a showing that they were clearly on notice of a palpable danger, as where it is so obvious that a layman would ascertain it without inquiry. (*Kovit v Estate of Hallums*, 4 NY3d 499 [2005]). As plaintiff testified that the glass fell suddenly while she was standing in the yard, and absent any proof that the possibility of glass falling on plaintiff from the fifth floor of the building while she was standing in the yard constituted a palpable danger, plaintiff has not demonstrated that the firefighters knew that their inaction would lead to harm. (*Compare Bergen v City of New York*, 200 AD2d 699 [2d Dept 1994] [where decedent notified police that neighbor was shooting gun, police issued neighbor summons, and that same day neighbor shot and killed decedent, there were no facts to establish that police knew that any inaction would lead to harm to decedent], *with Alvarado v City of New York*, 60 AD3d 427 [1st Dept 2009] [as defendant requested plaintiff's services to aid police officers in investigating domestic violence complaint, and as plaintiff was assaulted by suspect accused of domestic violence during investigation, it cannot be said as matter of law that police were unaware that inaction on their part could cause harm to someone in suspect's vicinity]).

Plaintiff has thus failed to show the existence of any triable factual issues as to whether City assumed a special duty toward her, and, thus, whether City may be held liable for negligence.

III. PLAINTIFF'S MOTION TO STRIKE

As plaintiff had neither alleged nor testified that the firefighters promised to protect her, any deposition of the firefighters would constitute a fishing expedition, and having failed to specify the documents she seeks, she has offered no basis for believing that the discovery will assist her in proving a special duty. Plaintiff has thus failed to demonstrate that any further

discovery would lead to "facts essential to justify opposition" (CPLR 3212[f]), and as no triable issues exist as to City's liability, the motion to strike is denied. (*See Auerbach v Bennett*, 47 NY2d 619 [1979] ["[t]o speculate that something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under CPLR 3212(f)"]; *Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359 [1st Dept 1995] [plaintiff failed to show requested discovery was more than fishing expedition]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that plaintiff's cross-motion for an order striking the answer is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 23, 2010
New York, New York

JUN 23 2010

FILED
JUN 29 2010
COUNTY CLERK'S OFFICE
NEW YORK