

**Ajarapu v City of New York**

2011 NY Slip Op 30778(U)

April 1, 2011

Sup Ct, NY County

Docket Number: 113953/09

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C.

PART 52

Index Number : 113953/2009

AJJARAPU, SAMUEL

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 113953/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision. This action is hereby transferred to a non-city part as the City is no longer a party to the action.

**FILED**

APR 04 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/1/11

CK  
CYNTHIA S. KERN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 52

-----X  
SAMUEL AJJARAPU,

Plaintiff,

Index No. 113953/09

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK, TRAFFIC AGENT  
MUHAMMAD KHAN, G.V.C. TRANSPORTATION,  
INC. and FU CHENG HUONG,

**FILED**

Defendants.  
-----X

APR 04 2011

HON. CYNTHIA S. KERN, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>          </u>
Affirmations in Opposition to the Cross-Motion.....	<u>2</u>
Replying Affidavits.....	<u>          </u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action to recover damages for personal injuries that he allegedly sustained while riding his motorcycle in Manhattan on February 15, 2009. He alleges he was struck by a bus owned by defendant G.V.C. Transportation Inc. ("GVC") and driven by defendant Fu Cheng Huong ("Huong") in the intersection of 10<sup>th</sup> Avenue and West 42<sup>nd</sup> Street in the City, County, and State of New York. Plaintiff also commenced this action against defendants The City of New York and traffic enforcement agent Muhammad Khan (hereinafter the "City") for negligently directing traffic at the intersection and for the City's negligent hiring

of Khan. The City now moves to dismiss the complaint and any cross-claims against it on the ground that it is not liable because plaintiff has not properly pled any special relationship between him and the City nor can he prove that the City owed him a duty of care in this matter. For the reasons set forth below, the City's motion is granted.

The relevant facts are as follows. On February 15, 2009 at approximately 12:40 p.m., plaintiff was operating his motorcycle in a northbound direction on 10<sup>th</sup> Avenue at its intersection with 42<sup>nd</sup> Street in Manhattan. Plaintiff claims he stopped at a red light immediately south of 42<sup>nd</sup> Street and was waiting for the light to turn green. While stopped at the red light, plaintiff was in the far left lane and alleges that there were cars in the lanes to the right of him traveling in the same direction. When the light turned green, plaintiff states he checked both his left and right sides to make sure the intersection was clear and proceeded through the intersection on his motorcycle. It was at that time that plaintiff alleges he was struck by a bus owned by GVC and driven by Huong.

Plaintiff's claim against the City for negligence in directing traffic and negligent hiring of Khan is based upon statements made by Huong that he drove the bus in a westerly direction on 10<sup>th</sup> Avenue as a result of the directions given by Khan who was directing traffic at the intersection of West 42<sup>nd</sup> Street and 10<sup>th</sup> Avenue at the time of the accident and who allegedly directed Huong to enter the intersection against a red light.

A municipality cannot be held liable for negligence in the performance of a governmental function unless a special relationship exists between the municipality and the injured party. *Cuffy v City of New York*, 69 N.Y.2d 255 (1987). "To sustain liability against a municipality, the duty breached must be more than a duty owing to the general public. There must exist a

special relationship between the municipality and the plaintiff, resulting in the creation of a duty to use due care for the benefit of particular persons or classes of persons.” *Florence v. Goldberg*, 44 N.Y.2d 189, 195 (1978); quoting *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 139 (1965); citing *Evers v. Westerberg*, 38 A.D.2d 751, 329 N.Y.S.2d 615 (2d Dept 1972), *aff’d* 32 N.Y.2d 684 (1973). Additionally, “when official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice.” *Tango v. Tulevech*, 61 N.Y.2d 34, 40 (1983).

Similar to “crime prevention, traffic regulation is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers.” *Balsam v. Delma Engineering Corp., et al.*, 90 N.Y.2d 966 (1997). Thus, “in order for an injured party to hold a municipality liable for negligently performing traffic control or traffic regulation functions, the party must demonstrate that a special relationship existed between it and the municipality.” *Kohn v. City of New York*, 19 Misc.3d 1146(A) (Sup. Ct. N.Y. County 2008). To allege that a “special duty” exists between the injured party and the municipality, the injured party must plead and prove the following:

- (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*, 69 N.Y.2d 255.

In the instant action, the court finds that the City is entitled to summary judgment because the plaintiffs originally failed to plead the existence of a special relationship and, in any event,

fail to establish at least three of the four elements of the special relationship. The direction of traffic by a City employee is a discretionary governmental function and the City cannot be held liable for the negligent performance of a discretionary governmental function absent a special duty. Plaintiff, however, has failed to allege a “special relationship” as a theory of a liability in his Notice of Claim, summons and complaint and bill of particulars. It is undisputed that a plaintiff is bound by the Notice of Claim and all new causes of action are barred if they are not alleged in the Notice of Claim. *Gonzalez v. NYCHA*, 181 A.D.2d 440, 441 (1<sup>st</sup> Dept 1992). One claim cannot necessarily be inferred by the existence of another. *Garcia v. O’Keefe*, 34 A.D.3d 334 (1<sup>st</sup> Dept 2006). Where a plaintiff did not allege in his notice of claim or complaint the existence of a special relationship, he cannot assert that theory or the facts underlying it for the first time in opposition to a motion for summary judgment. *Rollins v. New York City Bd. Of Educ.*, 68 A.D.3d 540 (1<sup>st</sup> Dept 2009).

Even if plaintiff had alleged a special relationship between him and the City, there is no evidence that a special relationship exists. First, there is no evidence of any specific assumption by the City’s traffic agent to act on plaintiff’s behalf. Plaintiff has never alleged that he had any contact with the traffic agent or even that he saw the traffic agent, thus demonstrating that no promises or actions were made of an affirmative duty to act. Moreover, plaintiff has not alleged and cannot prove that there was any contact between him and the traffic agent, let alone direct contact, which plaintiff is required to plead and prove. Finally, plaintiff must plead and prove that he detrimentally relied on the traffic agent’s affirmative undertaking. However, plaintiff has not alleged and cannot show that, prior to the accident, the traffic agent communicated any information to him directly upon which he reasonably and detrimentally relied.

The case relied upon by defendants GVC and Huong, *Ohdan v. City of New York*, 268 A.D.2d 86 (1<sup>st</sup> Dept 2000), is distinguishable. In *Ohdan*, defendants City of New York and traffic enforcement agent Audrey Jolly were sued for personal injuries suffered by plaintiff when Agent Jolly, in performing her duties of ticketing illegally parked cars and ordering those cars to move, ordered Mr. Rodriguez to move the car he was sitting in. Mr. Rodriguez did not know how to operate an automobile and attempted to tell Agent Jolly that he could not obey her orders. He spoke only Spanish and rather than trying to understand what he was saying, Agent Jolly yet again ordered him to move the car. When he eventually moved the car, he caused it to crash into a storefront and injured several individuals. The First Department in *Ohdan* explained that

“plaintiff does not premise her negligence claim on Jolly’s discretionary decision to ask the illegally parked drivers on that block to move their cars...nor on the absence of a policy requiring traffic officers to inquire first whether the occupant of the car could drive. Rather, plaintiff alleges that Jolly’s negligence consisted of harassing Rodriguez and ignoring his protests without making any effort to find out what he was saying. Such unprofessional behavior clearly does not fall within the range of discretionary decisions immunized by public policy.”

*Id.* at 95. In the instant action, traffic agent Khan’s decision to direct traffic into the intersection clearly falls within the range of discretionary decisions immunized by public policy and does not display the type of unprofessional behavior displayed in Agent Jolly’s behavior.

Finally, to the extent that counsel for defendants Huong and GVC asserted at oral argument that their cross-claims should not be dismissed because they have a “special relationship” with defendant Khan, that argument will not be addressed as it was never asserted in their opposition papers and cannot first be brought up at oral argument.

Accordingly, the City’s motion to dismiss plaintiff’s complaint and all cross-claims

