

Cristina v City of New York

2011 NY Slip Op 31589(U)

June 9, 2011

Sup Ct, NY County

Docket Number: 107826/10

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.
Justice

PART 52

ALQUIRRE, MARIA CRISTINA

INDEX NO.

107826/10

MOTION DATE

01

MOTION SEQ. NO.

MOTION CAL. NO.

- v -

CITY OF NEW

The following papers, numbered 1 to _____ were read on 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 annexed decision. This action is hereby transferred to a non-city part as the City is no longer a defendant in this action.

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

FILED

JUN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/9/11

CYNTHIA S. KERN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
MARIA CRISTINA AGUIRRE,

Plaintiff,

Index No. 107826/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK, THE NEW YORK
CITY POLICE DEPARTMENT, SUNNY'S
LIMOUSINE SERVICE, INC. and
GEOFFREY GILMAN,

Defendants.

FILED

JUN 14 2011

-----X
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>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she was struck by a car as she was crossing the street at the intersection of 34th Street and 2nd Avenue in Manhattan. Defendants The City of New York and the New York City Police Department (together, the "City") now move for summary judgment on the ground that the actions of the police officer directing traffic at the intersection were discretionary and, therefore, render the City immune from liability and/or because no special relationship exists between plaintiff and the City and on the grounds that a claim for negligent hiring and/or retention cannot lie where the employee was acting within the scope of his employment. For the

reasons set forth more fully below, the City's motion is granted.

The relevant facts are as follows. Plaintiff was crossing the street at the intersection of 34th Street and 2nd Avenue on November 12, 2009 at 4:00 pm when she was struck by a vehicle. At the time, a police officer was directing traffic at the intersection. Plaintiff alleges that the police officer negligently directed the vehicle which struck her to proceed through the intersection while she was lawfully crossing there and that this negligent direction of traffic caused the accident.

The state of the case law on municipal immunity is somewhat ambiguous. The Court of Appeals has specifically held that governments or municipalities are immune from liability for the actions of their agencies if those actions were discretionary. *See McLean v City of New York*, 12 N.Y.3d 194, 203 (2009). The *McLean* court explained that, "Governmental action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff..." *Id.* In *McLean*, the Court of Appeals specifically held that the "special relationship" exception can only apply if the governmental action at issue is ministerial. *See id.* Subsequently, in *Dinardo v City of New York*, 13 N.Y.3d 872 (2009), Chief Judge Lippman stated in his concurrence that although he believed that the *McLean* decision "effectively eliminates the special relationship exception," the court was nevertheless constrained by its holding. *See id.* at 876. However, in *Valdez v City of New York*, the First Department subsequently held that "it is inconceivable that the Court [in *McLean*] intended to eliminate the special duty exception" in police cases." 74 A.D.3d 76 (1st Dept 2010). The *Valdez* court went on to hold that the analysis should begin, not end, with whether the municipality had a special relationship with the plaintiff. *See id.* at 78. In *Valdez*, the First Department explicitly stated that

“the Court [in McLean] did not intend to eliminate the special duty exception” and that, when police action is involved, “a governmental agency’s liability for negligent performance depends *in the first instance* on whether a special relationship existed.” *Id.* at 78 (emphasis added). This court will therefore follow *Valdez* and determine first if such a special relationship existed. If not, the inquiry ends there. See *id.*

The elements of this “special relationship” are: “(1) an assumption by the municipality, through promises or action, 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 N.Y.2d at 260-61 (1987) (*citations omitted*).

The City is entitled to summary judgment because there was no special relationship between plaintiff and the municipality. As an initial matter, plaintiff does not even plead a special relationship. In addition, she fails to establish that there was any promise or assumption by the municipality of an affirmative duty to act on her behalf or that there was any direct contact between her and the police officer who was directing traffic before the accident.

To the extent plaintiff is making any claim for negligent hiring and/or retention of the officer who was directing traffic, that claim is also dismissed. “Where an employee is acting within the scope of his employment, thereby rendering the employer liable for any damages caused by the employee’s negligence under a theory of respondeat superior, no claim may proceed against the employer for negligence hiring or retention.” *Karoon v New York City Transit Auth.*, 241 A.D.2d 323 (1st Dept. 1997). Because it is undisputed that the police officer

