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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 : 101514/2009

CULLER, HAROLD

vs

CITY OF NEW YORK

Sequence Number : 001

DISMISS

INDEX NO. 101514/09

MOTION DATE

MOTION SEQ. NO. 01

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 ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

FILED

JUL 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

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

Dated: 7/20/11

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.

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

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HAROLD CULLER, an infant over the age of 14 years by his mother and natural guardian, MATTIE DUBOSE, and MATTIE DUBOSE, individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

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Index No. 101514/09

**DECISION/ORDER**



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

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..... | 1 |
| Notice of Cross Motion and Answering Affidavits..... | 2 |
| Affirmations in Opposition to the Cross-Motion..... | |
| Replying Affidavits..... | 3 |
| Exhibits..... | 4 |

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he was assaulted by a group of people after leaving a public city pool pursuant to the directions of the police. Defendant The City of New York (the "City") now moves for summary judgment on the ground that no special relationship existed between plaintiff and the City, thereby rendering the City immune from liability. For the reasons set forth more fully below, the City's motion is granted.

The relevant facts are as follows. On July 17, 2008, plaintiff and a friend went to the Hamilton Fish Pool on the Lower East Side of Manhattan at around 4 p.m. Pool staff checked

that the boys were wearing swim trunks and the boys then put their belongings in lockers. They then entered the pool and began talking to some girls. At around 5:15 p.m., plaintiff got out of the pool and went to the lockers. He continued talking to one of the girls. Another teenager came up to him, asked "Why are you talking to my girl?", threatened him with a box cutter and told him to come outside. Plaintiff told a police officer about the threat. The officer told him that everyone needed to leave as the pool was closing. Plaintiff saw the person who had threatened him near the entrance to the pool and saw about 20 more young men coming down the block holding sticks and bottles. Plaintiff went back inside and told the same police officer he had spoken to before that a group of armed young men were coming down the street. He also testified that he overheard a Parks Department employee talking to another employee, saying that those young men come and start trouble every year. The officer told him "You're fine, everything's okay, just leave." Plaintiff left. When he did, the group of young men was still there. They began chasing him and throwing bottles and sticks at him. He ran to the Essex Street subway station. As he descended into the subway station, a bottle hit him and a second hit the floor near him, causing him to trip and break his ankle. To escape, plaintiff ran into the station, hopped the turnstile and got on to an uptown F train. He got off at the Broadway-Lafayette stop and told the MTA toll booth attendant he needed help. The police arrived and an ambulance took plaintiff to Bellevue Hospital.

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 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.*

There are three ways a special relationship can be formed: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it [the municipality] voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation." *Pelaez v Seide*, 2 N.Y.3d 186, 199-200 (2004). It is undisputed that there exists no such statutory duty in the instant case.

This court therefore turns to the other two ways in which a special relationship can be formed.

To form a special relationship through the voluntary assumption of a duty there must be: "(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*).

In the instant case, plaintiff fails to raise a question of fact as to whether there was a special relationship between plaintiff and the municipality through the municipality's voluntary assumption of a duty. Plaintiff does not show that there was any promise or assumption by the municipality of an affirmative duty to act on his behalf. Rather, plaintiff establishes the opposite - that the police refused to undertake an affirmative duty to act. The police did not promise to act or to keep plaintiff safe. As there was no promise to rely on, plaintiff can also not establish justifiable reliance on such a promise. Therefore, although plaintiff does establish direct contact between himself and the municipality through two conversations with the police officer and knowledge on the part of the municipality's agent that inaction could lead to harm, plaintiff's inability to show a promise to act by the municipality and reliance on such promise means that he cannot establish a special relationship this way.

Nor does plaintiff raise an issue of fact as to whether he had a special relationship with the City by virtue of the municipality assuming "positive direction and control" of the situation in the face of a known "safety violation." *Pelaez*, 2 N.Y.3d at 203 (*citing Smullen v City of New*

*York*, 28 N.Y.2d 66 (1971)). In *Smullen*, the court found that a special relationship existed where the city inspector assigned to a construction site observed plaintiff descending into a trench, stated that the trench was pretty solid and that he did not think it needed to be shored, where in fact there was a "blatant violation" of safety rules relating to such trenches. The plaintiff was killed when the trench subsequently collapsed. The *Smullen* court explained that in that case, the municipality went "beyond the basic failure to perceive a violation. Here a blatant violation existed; the categorical regulations did not permit the inspector to form a judgment but he nevertheless proceeded to do so and wrongly adjudged the trench to be safe and stood by while decedent, knowing of his presence and approval, entered into the perilous situation," thereby establishing a special relationship. 28 N.Y.2d at 71. Similarly, in *Garrett v Holiday Inns, Inc.*, the court held that a municipality may be liable to the owners of a motel for damages incurred in a fire when "[i]f, as is alleged in the complaint[], known, blatant and dangerous violations existed on these premises but the town affirmatively certified the premises as safe, upon which representation appellants justifiably relied in their dealings with the premises..." 58 N.Y.2d 253, 262 (1983).

In the instant case, plaintiff has not cited any safety rule or regulation which was blatantly violated, a necessary predicate to finding a "special relationship" based on the municipality's assumption of "positive direction and control" of the situation. In both *Smullen* and *Garrett*, knowledge of "blatant" and "dangerous" safety violations were necessary to the courts' holdings that liability might be imposed. *Smullen*, 28 N.Y.2d at 71; *Garrett*, 58 N.Y.2d at 262. Without that predicate, plaintiff cannot raise an issue of fact as to whether he had a "special relationship" with the municipality and therefore the City is immune from liability.

Accordingly, defendant City's motion for summary judgment is granted and plaintiff's complaint is dismissed. This constitutes the decision and order and judgment of the court.

Dated: 7/20/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.