

Staudt v Sterling Mets, LP

2011 NY Slip Op 33292(U)

August 31, 2011

Supreme Court, Queens County

Docket Number: 22408/09

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Matthew Staudt,

Index
Number: 22408/09

Plaintiff,

- against -

Motion
Date: 8/9/11

Sterling Mets, LP d/b/a New York Mets,
Aramark Corporation, Aramark Sports and
Entertainment Group, LLC, The City of
New York, and "John Doe 1 through 10",

Motion
Cal. Number: 32

Defendants.

Motion Seq. No.: 3

-----X

The following papers numbered 1 to 9 read on this motion by defendant, The City of New York, for summary judgment.

Papers
Numbered

Notice of Motion(City)-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint against it is granted.

Plaintiff allegedly sustained injuries in a fight with several other young men in the parking lot of Shea Stadium in Queens County on August 20, 2008. Plaintiff testified in his 50-h hearing that he and a group of friends had attended a baseball game at Shea Stadium and, after the game was over, were heading to his car that was parked in the Stadium parking lot, when he got into a verbal altercation with another group of youths that escalated into a physical fight. He testified that Stadium security guards and a police officer were approximately 50 to 90 feet distant, that they did not come over to assist him and that approximately 4-5 minutes later, a mounted police officer approached after the other group of youths had scattered. The mounted officer asked plaintiff to point

out some of the individuals who he claimed jumped him and he was unable to do so. The mounted officer then told him to go home. Plaintiff further testified that as he headed back to his car, another police officer told him to go home, and then a third officer told him that he was drunk, and plaintiff, after denying that he was drunk, left the Stadium because he did not want to get arrested.

In his deposition, plaintiff testified that after he exited the turnstile at the Stadium, he turned left and walked approximately 20 feet when the incident occurred. It was approximately 10:00 P.M. and was dark and the only security guard he could see was "pretty far in the distance" standing next to a metal parade-type barrier. He also saw approximately three mounted police officers "far down the opposite direction, but they were - they were pretty far down". He also stated that as the group of youths, approximately eight in total, were hitting him, a group of mounted police officers approached, and the youths stopped and ran off in different directions. A mounted officer then allegedly asked him if he wished to press charges and plaintiff said how could he since the officer let them run off, whereupon the officer told him to just go home.

Plaintiff alleges in his complaint that the City was negligent in failing to protect him despite having a special duty to do so, in failing to have an adequate number of police officers on the grounds of the Stadium and in failing to have an adequate security or patrolling plan for the Stadium. Plaintiff also raises claims of negligent hiring, training and retention of police officers who were "incompetent, disposed towards vicious propensities, had bad dispositions, or were given to horseplay".

A discretionary act of a governmental entity may not form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). In contrast, a ministerial act may form the basis of liability against the City, but only if a special relationship existed between the plaintiff and the City. The Court notes that prior to McLean, courts were guided by such cases as Pelaez v Seide (2 NY 23 186 [2004]) and Kovit v Estate of Hallums (4 NY 3d 499 [2005]) which, it was generally thought, articulated the rule that a special relationship between the plaintiff and the municipality or municipal entity was an exception to governmental immunity from liability for the negligent performance of a discretionary act. However, the Court of Appeals, in McLean, for the first time held explicitly that the special duty exception to a municipal entity's immunity for negligence in the performance of a governmental function applies only to ministerial acts, as opposed to discretionary acts. "[D]iscretionary municipal acts may never be a

basis for liability, while ministerial acts may support liability only where a special duty is involved" (12 NY 3d at 202). The Court of Appeals further stated that "any contrary inference that may be drawn from the quoted language in Pelaez and Kovit is wrong" (id. at 203).

The job of a police officer to protect the public is clearly not a mere ministerial function. Rather, it is clear, and plaintiff does not dispute, that the alleged acts of the subject police officers in responding to the subject situation and in allegedly failing to protect plaintiff were acts involving their discretion.

Since the provision of police protection is a discretionary act for which the City cannot be held liable, the concept of special duty does not apply (see McLean v City of New York, supra; see also Dinardo v City of New York, 13 NY 3d 872 [2009], concurring ops of Lippman, J. and Ciparick, J.).

Indeed, counsel for plaintiff, in his affirmation in opposition, states that plaintiff is not basing his claim of liability upon the existence of a special duty. Instead, counsel argues that the New York City Police Department has a specific, legislatively-imposed, duty to preserve the public peace and protect the public, pursuant to §435(a) of the New York City Charter and, therefore, it had a duty to protect plaintiff when he was being assaulted in their presence. Counsel's argument is without merit. Regardless of the City Council's general pronouncement that the Police Department's duty is to protect and defend the public, and regardless of whether plaintiff casts the alleged duty of the City toward him in terms of a special duty or a specific statutory duty, how Police officers carry out such duty involves their discretion and judgment, which may never form the basis for liability against the City.

Likewise, providing police security to the Stadium is a function involving policymaking, and is therefore a discretionary act rather than a ministerial one (see generally Bonner v City of New York, 73 NY 2d 930 [1989]; Pope v State, 19 AD 3d 573 [2nd Dept 2005]). Since a discretionary act of a governmental entity may not form the basis of liability against it, and since the adequacy or efficacy of the City's security or patrolling plan, including the number of police officers allocated to the stadium, involved the discretion and judgment of the City, and plaintiff's counsel does not dispute that the City's measures in this regard were discretionary acts for which no liability attaches, plaintiff's cause of action for negligent security, based upon an allegedly inadequate security or patrolling plan or an adequate number of police officers, must fail.

With respect to plaintiff's claims of negligent hiring, retention and training, such decisions are also clearly discretionary rather than ministerial and may not form the basis of liability against the City. In any event, the causes of action for negligent hiring and retention are otherwise inapplicable under the facts of this case. In order to sustain such causes of action, plaintiff must demonstrate that the employer knew or should have known of the employee's propensity for the type of conduct that caused plaintiff's injury (see Bumpus v New York City Transit Authority, 47 AD 3d 653 [2nd Dept 2008]). There is no issue that any police officers were involved in any way in the fight that resulted in plaintiff's injuries. Therefore, the basis of plaintiff's causes of action for negligent hiring and retention, namely, that the officers were "incompetent, disposed towards vicious propensities, had bad dispositions, or were given to horseplay", is completely inapplicable to the facts of this case.

The Court notes also that plaintiff's testimony is that the police officers were stationed far away and that they did respond and intervene while the fight was in progress and that the group of youths with which he was fighting ran away at the approach of the mounted police officers. The majority of plaintiff's testimony is devoted to his complaints about how the officers failed and/or refused to arrest his assailants after the incident.

Finally, even if the concept of special duty applied to the facts of this case, which it does not, and indeed plaintiff's counsel concedes that it does not, the evidence on this record still does not raise an issue of fact as to the existence of a special duty.

"A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it 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 NY 3d 186, 199-200 [2004]) (internal citation omitted).

As to the first basis for a special relationship, there has been no allegation or showing that the City violated any statute that was enacted specifically to protect plaintiff or a class to which he belonged.

Moreover, there is no showing, on this record, that the City voluntarily assumed an affirmative duty that induced detrimental reliance on the part of plaintiff. The test for this second basis

for a special relationship requires all of the following elements: "(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 NY 2d 255, 260 [1987]; Pelaez, supra).

There is no evidence, on this record, to show that the City assumed, through any promises or actions, an affirmative duty to act on behalf of plaintiff or any detrimental reliance on any affirmative undertaking by the City. The City did not voluntarily assume a duty on behalf of plaintiff specifically through promises or actions that placed plaintiff in a position of danger.

Since the City did not make any promises or engage in any specific acts on behalf of plaintiff that placed him in any greater position of danger than he would have been otherwise, the second prong of the test, knowledge on the part of the municipality that inaction could cause harm, is inapplicable as well, since it depends upon the first.

Finally, no issue is presented as to the applicability of the third basis of a special relationship set forth in Pelaez, to wit, the assumption of positive direction and control in the face of a known, blatant and dangerous safety violation. That basis has not been alleged and is clearly inapplicable to the facts of the present matter.

The burden of establishing a special relationship rests upon the plaintiff, and said burden is a heavy one (see Pelaez v. Seide, 2 NY 3d 186, supra; Dixon v. Village of Spring Valley, 50 AD 3d 943 [2nd Dept 2008]). Plaintiff has failed to proffer any evidence of a special relationship and concedes that liability against the City may not be predicated upon the existence of a special duty. In any event, as heretofore stated, even if a special duty were established, or even a duty predicated upon a provision of the City Charter, as plaintiff's counsel contends, such would be irrelevant and would not serve to defeat the granting of summary judgment where the actions complained of were discretionary.

Plaintiff raises no other issue of fact in opposition. Plaintiff merely contends that the City's motion should be denied because it has failed to comply with plaintiff's discovery demands. However, the discovery sought by plaintiff is irrelevant, as it would not alter the fact that the actions complained of were

discretionary acts for which no liability may attach as a matter of law.

Accordingly, the motion is granted and the complaint is dismissed against the City.

Dated: August 31, 2011

KEVIN J. KERRIGAN, J.S.C.