

<b>Bouet v City of New York</b>
2013 NY Slip Op 30774(U)
April 8, 2013
Supreme Court, New York County
Docket Number: 113609/2010
Judge: Kathryn E. Freed
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: \_\_\_\_\_

PART 5

Supreme Court of the State of New York  
County of New York

## FILED

Index Number : 113609/2010  
BOUET, JAQUELINE A.  
vs  
CITY OF NEW YORK  
Sequence Number : 003  
DISMISS

APR 16 2013

COUNTY CLERK'S OFFICE  
NEW YORK

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is \_\_\_\_\_

*Defendants*  
 motion for Summary Judgment is granted  
 See decision/order, dated April 8, 2013,  
~~attached~~ annexed. The complaint and  
 cross-motions against all ~~Defendants~~  
 are dismissed.

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

Dated: April 10, 2013

\_\_\_\_\_, J.S.C.  
 HON. KATHRYN FREED  
 JUSTICE OF THE SUPREME COURT

1. CHECK ONE: .....  CASE DISPOSED
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
JACQUELINE A. BOUET,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, TIMOTHY HARRINGTON AND JOHN DOE 1&2 ( names fictitious as presently unknown to plaintiff intended to be the police officers that responded to an accident when plaintiff Jacqueline A. Bouet was struck by a motor vehicle on October 18, 2009,

Defendants.  
-----X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....2.....
REPLYING AFFIDAVITS.....	.....3.....
EXHIBITS.....	.....
STIPULATIONS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendants move for an Order pursuant to CPLR§ 3211(a)(7) dismissing the complaint against all encaptioned defendants, or in the alternative, pursuant to CPLR§ 3212 granting summary judgment to all encaptioned defendants. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court grants the motion.

**FILED**  
**APR 16 2013**  
**COUNTY CLERKS OFFICE**  
**NEW YORK**

DECISION/ORDER  
Index No.: 113609/2010  
Seq. No.: 003

PRESENT:  
Hon. Kathryn E. Freed  
J.S.C.

Factual and procedural background:

This action stems from an incident occurring on October 18, 2009, when plaintiff was struck by a vehicle while crossing the Bowery near Bond Street in the cross walk with the light in her favor. Plaintiff was unable to identify the subject vehicle or its driver.

Plaintiff filed a Notice of Claim on January 15, 2010. Said Notice of Claim is annexed to plaintiff's motion as Exhibit "B," and alleges in pertinent part, municipal liability for the N.Y.P.D.'s "failure to perform their policies and responsibilities," which include "the investigation of the circumstances of the accident, the identification of the person and vehicle involved, the recording and safekeeping of information particularly the identification of the person and vehicle involved....." In light of the aforementioned, plaintiff's theory of liability against the City is that she "was caused to lose the right to pursue a claim against the owner and driver of the motor vehicle which struck [her]."

Plaintiff commenced the instant action via a Summons and Complaint on October 15, 2010. Issue was joined upon service of the City's Amended Answer on March 22, 2011. Plaintiff then appeared at a GML §50-h hearing on June 30, 2010. During said hearing, she testified that she was unable to "see the truck [that struck her] at any time before the accident" ( p.15, lines 6-22).

Positions of the parties:

Defendants argue that plaintiff's claim that the City is liable to her for damages because the N.Y.P.D. was unable to obtain and/record the identity of the private motorist who struck her, thus impeding her ability to pursue a suit against said motorist, warrants dismissal because the N.Y.P.D. does not owe her any special duty. Defendants argue that New York courts have consistently held that a "special relationship" is a prerequisite for imposing liability on a municipality for negligence

in performing governmental functions.

In support of their position, defendants refer to and rely on Cuffy v. City of New York, 69 N.Y.2d 255 [1987] ). In that case, the Court of Appeals promulgated certain criteria that must be met in order to prove the existence of the requisite “special relationship.” The aggrieved plaintiff must plead and prove: (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.

Defendants argue that plaintiff fails to plead and prove all four criteria. They argue that to form a special relationship via the breach of a statutory duty, the governing statute must authorize a private right of action. Therefore, as her first cause of action, plaintiff merely alleges a violation of a duty to the public at large, and not a private duty to her. Additionally, defendants argue that plaintiff fails to prove that a special relationship was formed by the municipality’s assumption of a positive direction and control in the face of a known, blatant and dangerous safety violation, which did not exist here. Defendants also argue that the City is entitled to summary judgment based on the “governmental function immunity defense.” They further argue that the misfeasance or nonfeasance of the officers that is complained of, involves discretionary governmental functions for which liability cannot be found. Finally, defendants argue that plaintiff incorrectly alleges a cause of action pursuant to 42 U.S.C. § 1983 for a violation of her fifth and fourteenth amendment rights to due process with regard to both due process of law and property, including the right to participate in legal proceedings.

Plaintiff argues that the City's claim that the police were unable to obtain the identity of the private motorist who struck her, conveniently disregards the fact that the police report verifies that the driver of the subject vehicle was present at the site of the accident and gave a statement. She asserts that this fact supports her claim that defendants were careless, reckless, negligent and/or intentionally failed to properly investigate, report, record or maintain and safeguard the information that was or could have been obtained from a properly conducted investigation.

As support for her position, plaintiff refers to and relies on Cunningham v. City of New York, 28 Misc.3d 84, 907 N.Y.S.2d 529 ( N.Y. Sup. App. Term 2010) ). That case is factually similar to the case at bar. In Cunningham, as plaintiffs were walking through a parking lot, they were struck by a vehicle driven by an unidentified female. Similarly, they alleged that when the police arrived at the scene, the police failed, *inter alia*, to prepare and file an accident report, provide plaintiff with the unidentified driver's name, or file a claim with the Motor Vehicle Accident Indemnification Corporation ( "MVAIC" ).

That court subsequently denied the City's motion to dismiss, holding in pertinent part that plaintiffs' allegations "were sufficient to withstand defendant's motion to dismiss, since they manifest a cause of action for negligence premised upon the police officers' failure to perform nondiscretionary statutory duties enacted for the benefit of a class of persons of which plaintiffs are members, ie. automobile accident victims ( *see gen. MacLean v. City of New York*, 12 NY 3d 194, 199 [2009] ). The court also found that plaintiffs' allegations were sufficient to show that a 'special relationship' may have been formed between plaintiffs and the police officers as a result of the officers' alleged breach of certain statutory duties ( *see* V.T.L.600[1][b], [2][b] and 603[1] ).....)"

The Court finds the Cunningham case to be unavailing, it that in the instant case, a police report was duly prepared and filed. Additionally, the Court does not agree that it is the responsibility of the police to contact MVAIC, but that of the individual involved in the accident, who wishes to assert a claim.

Plaintiff also argues that she has complied with all the criteria set forth in Cuffy. She asserts that after she was struck and knocked to the ground, she heard the police that had arrived at the scene, tell her friend Kristen Okeley to accompany plaintiff into the ambulance. She also asserts that they told Ms. Okeley not to worry, that they would obtain any necessary information. Plaintiff now argues that this affirmative duty to act is tantamount to a statutory mandate. She also argues that by virtue of their appearance at the site, the police officers established direct contact with her, and that she reasonably and justifiably relied on their promise to obtain the information on her behalf.

Conclusions of law:

In reviewing a motion to dismiss pursuant to CPLR§ 3211, “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” ( Leon v. Martinez, 84 N.Y.2d 88, 97 [1994]; Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 [1977]; Martin v. Liberty Mut. Ins. Co., 92 A.D.3d 729, 730 [2d Dept. 2012] ). However, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration ( *see* Morone v. Morone, 50 N.Y.2d 481 [1980]; Gertler v. Goodgold, 107 A.D.2d 481 [1<sup>st</sup> Dept. 1985], *affirmed* 66 N.Y.2d 946 [1985] ).

In a motion to dismiss pursuant to CPLR §3212, “[t]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled

to judgment as a matter of law” ( Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 306 [1<sup>st</sup> Dept. 1985], citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985] ). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact ( see Zuckerman v. City of N.Y., 49 N.Y.2d 557 [1989]; People v. ex rel Spitzer v. Grasso, 50 A.D.3d 535 [1<sup>st</sup> Dept. 2008] ). “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” ( Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1985] ). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied ( Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Grossman v. Amalgamated Hous. Corp., 298 A.D.2d 224 [1<sup>st</sup> Dept. 2002] ).

It is well settled New York law, that a municipality is not liable for negligent performance of a governmental function unless there exists a special duty to the injured party, as opposed to a general duty owed to the public ( McLean v. City of New York, 12 N.Y.3d 194, 197 [2009]; Garrett v. Holiday Inns, 58 N.Y. 2d 253[1983]; In re East 91<sup>st</sup> Street Crane Collapse Litigation, 103 A.D.3d 502 [1<sup>st</sup> Dept. 2013] ). The rationale behind this rule is that the duty of the municipality is owed to the public at large rather than to individuals, and such services are “limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed” ( Riss v. City of New York, 22 N.Y.2d 579, 581-582 [ 1968] ).

In the case at bar, the Court finds that plaintiff has failed to satisfy the aforementioned criteria promulgated by Cuffy v. City of New York, *supra*. The Court finds that as to the first criterion, plaintiff fails to establish the existence of a special relationship existing between herself and the N.Y.P.D.. Indeed, “[t]o sustain liability against the municipality, the duty breached must be more

than owed to the public generally” (Lauer v. City of New York, 95 N.Y.2d 95, 100 [2000] ). The Court agrees with defendants that at best, the officers involved may have failed to completely perform their duty by leaving pertinent information out of the police report. However, the duty to even file a report is one owed to the public at large, and in no way, does this create a personal duty relegated solely to plaintiff.

Indeed, to form a special relationship through the breach of a statutory duty, the governing statute must authorize a private right of action ( Pelaez v. Seide, 2 N.Y.3d 186 [2004] ). A private right of action can be formed in one of 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 ( *id.* at 198-199; *see also* Signature Health Center, LLC v. State, 28 Misc.3d 543, 550, 902 N.Y.S.2d 893 [ Ct. of Claims, N.Y. Co. 2009], *lv denied* 19 N.Y.3d 811 [2012] ).

As to the second criterion, there exists no discernable evidence that any inaction on the part of the responding police officers, could have and actually did result in harm to plaintiff. The Court is not convinced that even if the officers’ conduct and actions could justifiably be considered a deviation from protocol, that such deviation would have made a difference in the outcome of her accident. Indeed, “the mere fact that a consequence might foreseeably result from an action or condition does not serve to establish a duty owing from a defendant to a plaintiff” ( Gonzalez v. Pius, 138 A.D.2d 453, 455 [2d Dept. 1988], *lv denied* 72 N.Y.2d 810 [1988] ). It is also important to note that the doctrine of governmental immunity was purposely enacted to shield public entities from liability for discretionary actions taken during the performance of governmental functions ( *see*

Matter of World Trade Ctr. Bombing Litig., 17 N.Y.3d 428 [2011]; Lauer v. City of New York, supra ).

Plaintiff has also failed to establish the third criterion, regarding any “direct contact,” occurring between her and the subject police officers. Indeed, no evidence has been presented which indicates that any direct contact occurred, or more importantly, that any promises were made to her by the subject police officers. At most, the officers spoke to plaintiff’s friend, not to plaintiff, and their actions or alleged verbal promise that they would obtain information, does not give rise to a binding responsibility.

Plaintiff has also failed to establish the fourth and final criterion. Again, there is no evidence to support plaintiff’s contention that she justifiably relied to her detriment, on the police officers’ affirmative undertaking. Indeed, there does not even appear to be any semblance of an “affirmative undertaking.” General and vague assurances that something will be done in response to a prior complaint by the injured person, will not suffice. In the instant case, the general assurances that plaintiff states she overheard the officers allegedly make to her friend, are not indicative of an affirmative duty owed to her, or an awareness that their actions could harm her in any way.

The Court also finds that plaintiff has failed to sufficiently assert a 42 U.S.C. § 1983 claim. It is well settled that a plaintiff may not hold a municipality liable pursuant to § 1983 under a theory of respondeat superior ( *see* Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 694 [1978] ). In order to assert a claim against a municipality for civil rights violations pursuant to 42 U.S.C. § 1983 based on the alleged tortious actions of its employees, the plaintiff must allege and plead that the alleged actions resulted from an official municipal policy or custom that caused plaintiff to be subjected to a denial of a constitutional right ( *see* Monell v. Dept. of Social Servs. of

City of New York, supra; see also Leftenant v. City of New York, 70 A.D.3d 596 [1<sup>st</sup> Dept. 2010];  
Leung v. City of New York, 216 A.D.2d 10 [1<sup>st</sup> Dept. 1995] ). “Section 1983 is only a grant of a  
right of action; the substantive right giving rise to the action must come from another source”  
( Singer v. Fulton County Sheriff, 63 F.3d 110, 119 [2d Cir. 1995] ).

In the case at bar, the Court finds that a single incident alleged in a complaint, “especially  
if it involved only actors below the policy-making level, does not suffice to show municipal liability”  
( Harley ex.rel. Johnson v. City of New York, 36 F. Supp. 2d 136, 142 ( E.D.N.Y. 1999) ).

Therefore, in accordance with the foregoing, it is hereby

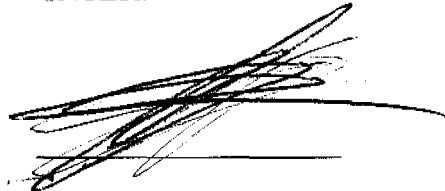
ORDERED that defendants’ motion for summary judgment is granted; and it is further

ORDERED that the complaint and any cross-claims against them are dismissed; and it is  
further

ORDERED that defendant City shall serve a copy of this order on all other parties and the  
Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently  
scheduled are hereby cancelled; and it is further

ORDERED that this constitutes the decision and order of the Court.

ENTER:



Hon. Kathryn E. Freed  
J.S.C.

DATED: April 8, 2013

**FILED**  
APR 16 2013  
COUNTY CLERK'S OFFICE  
NEW YORK