

Claudio v Sawyer

2013 NY Slip Op 32746(U)

October 28, 2013

Supr Ct, New York County

Docket Number: 104877/2010

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED

PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 104877/2010
CLAUDIO, LISA
vs.
SAWYER, SEAN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT *COL: # 15*

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10-28-13
OCT 28 2013


_____, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
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
LISA CLAUDIO, as Administrator of the Estate of
JAYSON TIRADO, deceased, and JAYLENE
TIRADO, an infant by her mother and natural
guardian of LISA CLAUDIO,

Plaintiffs,

DECISION/ORDER
Index No. 104877/2010
Seq. No. 001

-against-

SEAN SAWYER, and THE CITY OF NEW YORK,

Defendants.

FILED

NOV 01 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

-----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.....1-2 (Exhs. B-M)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3-4 (Exhs. 2-16).
REPLYING AFFIDAVITS.....5.....
EXHIBITS.....
OTHER.....

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

Defendant The City of New York ("the City"), moves for an Order pursuant to CPLR§ 3212,
granting summary judgment, or in the alternative, pursuant to CPLR§ 3211(a)(7), dismissing the
complaint and any and all cross-claims against it. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court **grants**
the instant motion for summary judgment.

Factual and procedural background:

The following factual recitation emanates from a compilation of the version of events

proffered by both sides, with the Court acknowledging the disputed aspects of this most tragic event. On October 21, 2007, decedent Jayson Tirado (“Tirado”) had been “hanging out” with a group of people, along with friends Jason Batista and Anthony Mencia, by Avenue D between 8th and 10 Streets in New York County. At some point, the group decided to proceed to Dykman Marina, (“Marina”), a notable social spot where individuals in cars and on motorcycles engage in drag racing. It is disputed whether Tirado, Batista and Mencia proceeded to the Marina with the intent of participating in any drag racing. However, the Court finds this irrelevant to its determination of the instant motion.

Tirado and Batista had known each other most of their respective lives, having grown up in the same neighborhood. Both had been to the Marina together in the past. On this particular morning, due to the fact that Tirado did not have a driver’s license, Mencia was driving Tirado’s purple Honda Civic with Batista and Tirado as passengers. They eventually arrived at the Marina at approximately 2:30 am. Other friends began arriving and they all assembled, listening to music and socializing. During the time that they spent at the Marina, it is undisputed that Tirado had imbibed at least 3 one half gallon containers of “Nemos,” a slushy type beverage containing a blend of four different types of liquor. Batista subsequently testified in his deposition, that “the word on the street” is that Nemos sometimes also contain the drug Ecstasy. Uncertain if any of the Nemos being served up that morning contained Ecstasy, Batista refrained from drinking them. While others also smoked marihuana, Batista testified that he did not personally observe Tirado partaking in the marihuana smoking.

After remaining at the Marina for approximately three hours, Tirado, Batista and Mencia left at approximately 4:45 am. Mencia was again driving the Civic, however, prior to reaching the FDR

Drive, Tirado took the wheel because Mencia was too intoxicated to drive. Tirado also took the opportunity to change a fuse in an attempt to get the car radio working. Batista believed Tirado was able to drive. Afterward, he resumed driving. Due to an unrelated accident on the FDR Drive, traffic was being diverted off the highway, and all three lanes of moving traffic were forced to merge and exit at 116th Street.

Also in the vicinity that morning, was defendant Police Officer Sean Sawyer (“Sawyer”), who was off duty and driving his personal vehicle, a yellow Nissan X-Terra. Sawyer was employed by the NYPD as an officer in the Queens Narcotics Unit. On Saturday, October 20, 2007, he worked from 10:00 am to 6:00 pm and was armed with his off-duty firearm, a Glock 26. While serving as a “ghost,” a backup for an undercover officer involved in a “buy and bust” drug operation, he consumed one half of a twelve ounce bottle of beer. When his tour ended, Sawyer proceeded to meet Eileen Fitzgerald, an employee of the Queens District Attorney’s Office, at a bar which was allegedly hosting an open bar birthday party. They met at 1:30 am, and then decided to go to the “Gaslight Bar,” located in Queens.

They arrived at the Gaslight at approximately 2:30 am. Prior to entering the bar, Sawyer placed his firearm underneath the driver’s seat of his vehicle, in compliance with NYPD rules prohibiting law enforcement personnel from entering bars in possession of a firearm. Sawyer and Fitzgerald remained at the Gaslight for approximately 45 minutes, during which he drank two rum and cokes. They then left and Sawyer drove Fitzgerald to her home in Queens. Upon arrival, they remained in the car for awhile talking. Sawyer then left, presumably intending to drive to Manhattan where he lived with his wife and two daughters.

As the Civic and X-Terra were exiting 116th Street, Tirado was allegedly situated in the right lane when Sawyer attempted to cut in front of him. Tirado maneuvered the Civic so that it was bumper to bumper with the X-Terra, which was directly in front of him. Sawyer later maintained that he perceived this to be a deliberate attempt to prevent him from cutting in. Sawyer subsequently testified that he was in the middle lane attempting to merge when he observed Tirado's Civic edging its way into his lane. Sawyer honked his horn and gestured to Tirado that there was no room for Tirado to merge. Sawyer testified that because the X-Terra is high, he was able to see that there were three individuals inside the Civic and that the front seat passenger was leaning out of the window vomiting. As both vehicles exited onto 116th Street, the Civic was directly in front of the X-Terra. Sawyer sped up, passed the Civic and continued westbound on 116th Street towards Pleasant Avenue. Through his rear view mirror he saw the Civic's lights flicker on and off, then the Civic sped up, crossed over into the eastbound lane, and pulled up parallel to the X-Terra.

Tirado and Sawyer engaged in an angry verbal exchange, punctuated frequently with the "F" word. Sawyer then accelerated and continued driving westbound on 116th Street towards First Avenue, when Tirado again sped up and pulled along side of him. This provoked another heated exchange, wherein Tirado allegedly threatened to "knock [Sawyer] out." Sawyer attempted to leave the scene, making a right onto First Avenue. Despite the fact that Tirado would have had to proceed southbound in order to get home, he instead made a right turn driving northbound on First Avenue, driving parallel to Sawyer's vehicle.

Since this was the second time that Tirado was pulling along side his vehicle, Sawyer testified that he began to believe that Tirado's threat could now possibly escalate into a real confrontation. Hence, he removed his gun from its holster and placed it on his lap at 116th Street

between Pleasant Avenue and First Avenue. The traffic light on First Avenue was red, however, Sawyer drove through it and made a right turn from 116th Street to First Avenue going northbound in an attempt to get away from Tirado. He then heard the screeching of tires, looked around and observed the Civic pursuing him again. He placed his gun between his legs holding it in his right hand in a pointed down position.

Tirado pulled up alongside Sawyer. According to the testimony of both Batista and Sawyer, Tirado made a statement to the effect of, "Do you want to see my Ruger?" Tirado then reached down in between the seats of his vehicle, emerging with his arm extended, in a motion that appeared to Sawyer that he was in the process of drawing a gun. However, while never actually observing a gun, Sawyer still fired his gun with his right hand while driving with his left hand.

Rosado later testified that he observed Tirado merely put two fingers up, and that he did not possess a gun or any other weapon. Rosado also testified that right after Tirado's hand went up, he heard Tirado yell "oh, shit," while attempting to accelerate. Batista then heard shooting and the breaking of glass. Sawyer had fired at least two shots from his own gun, killing Tirado. Sawyer then fled the scene, failing to report the incident to the NYPD, as required. Subsequent photographs taken of the Civic revealed bullet holes in its rear passenger window and the rear bumper. The following day, upon becoming aware of the fatality while watching the news, he decided to go to the precinct to inform his command of what had occurred. When he went outside to catch a cab, he saw a passing patrol car. He flagged it down, and apprised the officers that he had been involved in a shooting.

The NYPD's Firearms Discharge Review Board subsequently determined that Sawyer did not violate any Departmental guidelines with respect to his firearm discharge. As a result of the

shooting, he pled guilty to charges and specifications by the NYPD for his failure to report the incident to a supervisor or call an ambulance; failure to secure his firearm; and failure to notify the desk sergeant in the precinct of the occurrence after being involved in an off-duty firearm discharge. Consequently, Sawyer was dismissed from the NYPD in August 2009. An autopsy subsequently performed on Tirado revealed that he had been shot in the back. However, a Grand Jury declined to indict Sawyer for killing Tirado.

Sawyer was appointed as a New York City Police Officer on January 20, 2004. He spent six months at the Police Academy during which he received both classroom and practical training in the use of a firearm. He also received practical tactical instruction and interactive training. Upon graduation, he was required to re-qualify his firearm every six months. This involved shooting at targets. Upon being transferred to the Narcotics Unit, Sawyer underwent additional tactical training geared towards scenarios involving undercover officers, with instruction on how to conceal and retrieve his firearm. He was later transferred to the Queens Narcotics Unit where he worked as an undercover officer. He was authorized to carry two firearms, his service weapon and an off-duty weapon. Prior to the instant incident, his Glock has been inspected to insure that it was operational and he had been qualified for use of both weapons.

Plaintiff Lisa Claudio, Tirado's girlfriend and the mother of their infant daughter, Jaylene Tirado, commenced the instant action against the City on or about April 15, 2010, via the filing of a Summons and Complaint. Said Complaint alleges causes of action for assault, battery, negligence and recklessness as against Sawyer. As against the City, plaintiff also alleges negligent training, supervision and instruction in the use of deadly force as well as consumption of alcohol and wrongful death. Plaintiff further alleges that Sawyer's actions deprived Tirado of the rights and

privileges guaranteed by Article I, § 12 of the New York State Constitution.

Issue was joined by the City's Answer on or about June 21, 2010. On or about October 13, 2010, Sawyer served a verified answer. Plaintiff served a verified bill of particulars dated July 10, 2010, alleging that the City was negligent in failing to provide adequate training in the use of force and the consumption of alcohol. It is important to note that prior to commencing the instant action in New York State Supreme Court, plaintiff had commenced a federal action in the United States District Court, Southern District of New York, alleging violations of 42 U.S.C. §1983, in addition to state law claims. In a decision dated December 23, 2009, Hon. Denny Chin granted the City's motion and dismissed all federal claims against the City, determining that plaintiffs' amended complaint failed to state a claim that Sawyer acted under color of law at the time of this unfortunate incident, a necessary element of an action pursuant to 42 U.S.C. §1983. However, the state law claims were dismissed without prejudice, to afford plaintiff the opportunity to re-file in state court.

Plaintiff now asserts state law causes of action against the City and Sawyer. As against Sawyer, the complaint alleges a negligence cause of action as well as causes of action for assault and battery. As against the City, the complaint alleges causes of action for its negligence in training and instructing Sawyer. Jason Batista also commenced an action against the City and Sawyer via the filing of a summons and complaint on October 8, 2008. Issue was joined by service of the City's answer on or about January 14, 2009 in that case.

Several depositions were conducted. In its aforementioned recitation of what it perceives to be pertinent testimony, the Court emphasizes the fact that its sole function at this juncture is to ascertain whether the City has established a prima facie entitlement to summary judgment. Toward this end, the Court seeks merely to follow the law in making this determination and reminds the

parties that despite the terrible tragedy that has occurred here, “[t]he Court’s function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues” (*Ruiz v. Griffin*, 71 A.D.3d 1112, 1115 [2d Dept. 2010]).

On December 18, 2012, the deposition of Detective Patrick DeCanio was conducted. Detective De Canio has been a member of the NYPD since 1992, and has been assigned to the NYPD Firearms and Tactics Section for over thirteen years. He testified in pertinent part that his responsibilities in this section include all aspects of training from the recruit level up to the highest level for the safe and proficient use of firearms and any related tactical things (Exh. 5, p. 15, lines 16-23). He testified that said training involves training officers who teach other officers to: maintain and reload weapons, assume certain firing positions, point the gun in a downward position until coming closer to the target; and how to unholster and draw the weapon (*id.* p.15, line 25; p. 16, lines 1-22).

Detective DeCanio also testified that all NYPD service and off duty weapons are either going to be 38s or nine millimeters, and that the type of off duty handgun an officer is authorized to carry is not related to his command or assignment (*id.* p. 19, lines 10-12, p. 20, lines 12-25). He explained that a Glock 26 is a nine millimeter weapon that carries ten in the clip and one in the chamber, (*id.* p. 24, lines 11-18), and has one external safety, which does not have to be switched on or off (*id.* p. 29, lines 6-10).

Detective DeCanio also testified that an officer is permitted to draw and or display his/her firearm if there is a threat or perceived threat causing the officer to believe that he/she may soon need to use said firearm to defend himself/herself or a third person. It is not to be utilized as a tool of intimidation (*id.* pp. 149-153). He also testified that “[t]he police officer should be armed while in

the confines of the five boroughs. It is not necessary for them to be armed outside of the five boroughs, and it is generally not recommended or frowned upon for the police officers to carry firearms when they are consuming alcohol or they are put in a position where they can not properly secure that weapon in an appropriate fashion, such as going to the gym or the beach as an example” (*id.* p. 167, lines 6-16). Detective DeCanio testified that he was aware that there are certain officers who consume alcohol while on duty. However, he further testified that remaining “fit for duty is something that is not entirely left up to [the officer’s] judgment because, obviously, if the officer was unfit for duty, they don’t have proper judgment. It’s what Breathalyzers are for” (*id.* p. 168, line 2-15).

Positions of the parties:

Plaintiff argues that the instant motion for summary judgment necessitates denial in that there are “at a minimum, trial questions of fact.” (*Aff. in Opp.*, p. 24 ¶ 85). It is important to note at the inception that plaintiff asserts that “plaintiff will withdraw the Sixth Claim For Relief in the complaint as it relates to Mr. Sawyer’s hiring. Plaintiff claims that she is not asserting that the City negligently hired or retained Mr. Sawyer, claims for which notice of his dangerous propensities would be necessary. Rather, she seeks redress for the City’s failure to properly *train and instruct* its police officers, including Mr. Sawyer” (*id.* p. 32 ¶ 108). Plaintiff agrees that “[p]lainly, the decision to hire or retain an employee, if negligent, would be unconnected to wrongs committed while away from the employment. If the tortious conduct took place outside of the work place and work hours, the decision to hire and retain the tortfeasor cannot be connected to the tortious conduct” (*id.* p.31 ¶ 106).

However, plaintiff asserts that the City's argument in favor of granting summary judgment dismissing plaintiff's negligent training and instruction claims confuse those claims with claims for negligent hiring and retention. Plaintiff vehemently argues that there is a significant difference between the two concepts, particularly in the instant case wherein the failure to adequately train and instruct was specifically related to off-duty conduct. Plaintiff argues that "the Police Department expects police officers to take 'police action' even when they are off-duty. For that reason, police officers are expected to carry their firearms while off-duty. The City is well-aware of the use of firearms by off-duty police officers, yet it fails to provide adequate training for that situation. It is also well-aware of the practice of carrying firearms while consuming alcohol, but fails to provide adequate instruction. The City, in failing to properly prepare its off-duty officers to undertake the grave responsibilities it imposes, puts its off-duty officers in positions they are not prepared for. Under these circumstances, of course there is a very direct nexus between the training and instruction, or lack thereof, and the wrong committed by the off-duty officer" (*id.* p. 32 ¶ 107).

In support of her argument, plaintiff refers to and relies on various NYPD Firearms Discharge Annual Reports which she claims demonstrate a consistent and persistent pattern of shootings by off-duty officers. She also argues that further discovery concerning the compilation of the statistics contained in said reports is necessary to show that the City knew or should have known of the numerous deficiencies inherent in the NYPD's firearm training.

The City responds that the First Department has held that where an officer is not acting within the scope of his employment, any alleged deficiency in training could not have proximately caused (Tirado's) injuries/death as a matter of law. It argues that an employer's liability cannot be established where the nexus between the alleged negligence and injury is severed by time, distance

and/or intervening independent factors. Additionally, with regard to plaintiff's allegation of failure to train and instruct, the City argues that the cases plaintiff cites in support of the proposition for a state law negligent training cause of action, involve circumstances wherein police officers were acting within the scope of their employment and in performance of their official duties, completely inopposite to the present set of facts.

Furthermore, the City argues that plaintiff's claims for assault, battery, negligence and recklessness necessitate dismissal as a matter of law in that Sawyer was not acting within the scope of his employment at the time of the incident, since his altercation with Tirado was purely personal in nature. The City asserts that because Sawyer never identified himself as a police officer and never displayed his badge prior to firing his gun, it cannot be held liable under the theory of respondeat superior. The City further argues that plaintiff's claim for violation of Tirado's State constitutional rights also warrants dismissal as the provision plaintiff relies on is inapplicable and Sawyer was not acting under color of law at the time of the incident.

Conclusions of law:

"The proponent of a summary judgment motion 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. 303, 306 [1st Dept. 2007], 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 New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory statements, 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. 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 [1st Dept. 2002]).

Whether an employee’s actions fall within the scope of his or her employment is ordinarily a question for the trier of fact, “except where there are no disputed facts and there is no question that the acts of the employee fell outside the scope of employment” (*Fainberg v. Dalton Kent Sec. Group*, 268 A.D.2d 247 [1st Dept. 2000]; *Boyd v. Fulton Terrace Associates, LLC*, 11 Misc.3d 144(A), N.Y. Slip Op. 50795(U) (Sup Ct Bronx County 2006)).

It has been held that a cause of action sounding in negligence is legally sustainable against a city when the injured party demonstrates that he was injured due to the negligent training and supervision of a law enforcement officer (see *Meistinsky v. City of New York*, 285 A.D.2d 1153 [2d Dept. 1955], *affd* 309 N.Y. 998 [1956]; see also *Barr v. County of Albany*, 50 N.Y.2d 347 [1980]; *Pickett v. County of Orange*, 62 A.D.3d 848 [2d Dept. 2009]; *Hooper v. Meloni*, 123 A.D.2d 511 [4th Dept. 1986]). However, the officers involved in these cases and others cited by plaintiff were actually technically on-duty, acting in the course of their employment.

A review of case law has revealed that the Appellate Division has been inclined not to impute liability to a municipality for an intentional shooting by a member of the NYPD acting outside of the scope of employment, whether the theory is respondeat superior or the City’s own negligence in hiring, retention or training (see *Barton v. City of New York*, 15 Misc.3d 504, 2009 N.Y. Slip Op. 27096 (Sup Ct N.Y. County 2007]). The Court finds this case particularly instructive. In *Barton*, plaintiff sued for injuries sustained after being shot by an off-duty NYPD detective in a bar outside

the confines of the City. While asserting that the City had failed to proffer any “direct evidence” on whether at the time of the shooting, the off-duty officer was furthering its employer’s business or acting for wholly personal reasons, that court still determined that the City had established a prima facie showing that it was not vicariously liable for any injury as a result of the shooting.

The Barton court found the case of *Bell v. City of New York*, 137 N.Y.S.2d 104 [Sup Ct, NY County 1954], *affd* 285 A.D.1143 [1st Dept. 1955], to be particularly instructive and compelling. Like *Barton*, *Bell* also involved an off-duty shooting in a bar. The *Bell* court found no viable basis for finding the City responsible for that officer’s acts, stating “[h]e was not on duty; he was not acting in the capacity of a police officer; he was a patron in the bar; he got into a dispute with another patron which ripened into physical combat, resulting in the fatal occurrence.” (*Id.*) The *Barton* court stated that “[t]he (Bell) court’s conclusion is consistent with many others that refuse to find the City liable when the private disputes of its law enforcement officers result in harm (see, for example, *Campos v. City of New York*, 32 A.D.3d 287, 291-292 [1st Dept. 2006], *app dismissed* 9 N.Y.3d 953 [2007]; *Pungello v. City of New York*, 18 A.D.3d 216, 216 [1st Dept. 2005]; *White v. Thomas*, 12 A.D.3d 168, 168 [1st Dept. 2004]; *Seymour v. Gateway Prods.*, 295 A.D.2d 278, 278 [1st Dept. 2002]; *Johnson v. City of New York*, 269 A.D.2d 359, 359-360 [2d Dept. 2000], *lv denied* 95 N.Y.2d 755 [2000]).”

In the case at bar, the Court finds that the City has made out a prima facie case of entitlement to summary judgment by sufficiently establishing that defendant Sawyer’s action was derived from a purely personal motive, was solely personal in nature, and was unequivocally not within the scope of his employment with the NYPD (see *Cardona v. Cruz*, 271 A.D.2d 221 [1st Dept. 2000]). Aside from mere conclusory assertions and personal opinions, plaintiff has failed to present evidence which

would raise a triable issue of fact (see *Zuckerman v. City of New York*, 49 N.Y.2d at 559). The Court notes that there is no evidence or claim that Sawyer ever indicated during the course of the altercation that he was a police officer. While the Court finds Sawyer's behavior to be egregious, it was solely *his* behavior and not the policies and/or customs of an entire police department that was and is responsible for Tirado's untimely and tragic death. Moreover, the Court is mindful that Justice Chin had previously ascertained that the altercation between Sawyer and Tirado, however unfortunate, was "purely private."

Plaintiff argues that her claim for negligent training must be treated differently than her claim for negligent hiring and retention, contending that there is significant difference between the two causes of action. However, the Court finds that plaintiff cannot prove the necessary nexus or proximate cause between the City's training and what was clearly Sawyer's personal action/conduct. Plaintiff argues that the City fails to prepare and properly train its officers by requiring them to carry firearms while off-duty, even when, like in the instant matter, there is the likelihood that this will be done in conjunction with alcohol consumption. Thus, this is a direct nexus between the training and instruction, or lack thereof, and the act committed by Sawyer.

The Court notes that the Appellate Division has developed a policy that when a shooting is intentional, the municipality should not be held liable. This policy stems from a series of cases which have previously explored the issue of proximate cause and its relation to negligent conduct. "The concept of proximate case, or more appropriately, legal cause.....stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct" (*Derdiarian v. Felix Contr. Corp.*, 51 A.D. 2d 308, 314 [1980]). In *Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134 [2d Dept. 1975], the court stated "[i]n essence, proximate cause represents a

policy decision by which it is determined how far removed an effect may be from its cause in fact for the action nevertheless to be held legally responsible. (*Id.* 139).

In the case at bar, the Court finds that because Sawyer intended to shoot Tirado, the City cannot legally be held responsible due to negligent training, because the requisite proximate cause cannot be demonstrated between Sawyer's action and the City's training. Put a different way, Sawyer's intentional act serves as an intervening factor which was far too removed from his training to legitimately hold the City legally responsible for his conduct. The Court also finds that plaintiff's additional claims against the City for assault, battery, negligence and recklessness also warrant dismissal based on the fact that Sawyer was not acting within the scope of his employment at the time of the shooting.

Finally, the Court finds plaintiff's additional argument that the City's actions deprived Tirado of the rights and privileges accorded and guaranteed by Article I, § 12 of the Constitution of the State of New York, because the use of deadly force falls within its ambit, to be unavailing. This section was specifically enacted to guarantee "a right of personal security against arbitrary intrusions of official power," (*Coolidge v. New Hampshire*, 403 U.S. 443, 455 [1971]), and is not relevant here.

Under this section and the Fourth Amendment to the United States Constitution, individuals are protected from "unreasonable searches." The applicability of constitutional protections depends on whether the person invoking such protection can claim a reasonable or a legitimate expectation of privacy invaded by governmental action (*Smith v. Maryland*, 442 U.S. 735, 740 [1979]). Since the Court has determined that Sawyer was not acting under color of law at the time of the incident, the argument that Tirado's constitutional rights were violated is devoid of merit. Moreover, Article 1, § 12 is clearly inapplicable to the facts of the instant case.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the City of New York's motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. 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

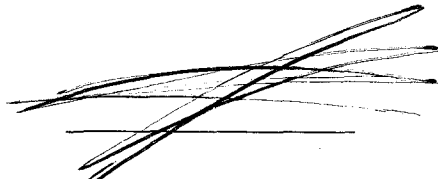
ORDERED that this constitutes the decision and order of the Court.

DATED: October 28, 2013

ENTER:

OCT 28 2013

FILED



NOV 01 2013

Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

NEW YORK
COUNTY CLERK'S OFFICE