Hines v City of New York
2014 NY Slip Op 33094(U)
May 5, 2014
Supreme Court, Queens County
Docket Number: 680/07
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

Lovey Laverne Hines, as Limited Administratrix of the Estate of Sierra Helena Roberts, Plaintiff, - against -	Index Number: 680/07 Motion Date: 4/15/14
The City of New York, The Administration for Children's Services, The Human Resources Administration, The Department of Social Services, and The Department of Education of the City of New York, Defendants.	Motion Cal. Number: 47 Motion Seq. No.: 4

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9

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

Motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff's decedent, Sierra Roberts, died on October 25, 2005 as a result of suffering blunt force trauma to her abdomen inflicted by her father, non-party Russell Roberts, who was subsequently convicted of manslaughter in the first degree.

In 1998, Sierra was removed from the custody of her parents as a result of their drug abuse and placed with a foster care agency, which, in turn, placed Sierra in the care of foster parents. Over the following two years, Russell Roberts completed a course of parenting classes and a drug rehabilitation program, and Sierra was discharged to his care on a trial basis in December 2000, with the final discharge becoming effective in November 2001. Preventive

services were not deemed necessary.

In September 2001, Roberts took Sierra to the emergency room of Brookdale Hospital to be treated for a swollen eye, which he reported was suffered when she fell while running with a toy in her hands. This incident was noted in the foster care agency's records but abuse was not suspected by the caseworker.

In December 2002, Sierra suffered a fractured spine for which she underwent surgery on January 2, 2003 at the Hospital for Special Surgery. Roberts stated that she had fallen down the stairs. Sierra was thereafter admitted to New York Foundling Hospital to recover. The New York Foundling Hospital records note that there was no indication of abusive behavior on the part of Roberts toward Sierra and that he was involved in her medical care, and that the only negative interaction between them was that Roberts was overheard scolding Sierra. In March 2003, Sierra was transferred to Blythedale Children's Hospital where she remained until discharged to Roberts in May 2003. That hospital's records indicate no evidence of abuse.

Shortly after being discharged to her father, Sierra was admitted to the emergency room of Brookdale Medical Center for treatment of a fractured leg. Roberts stated that her injury occurred when he tripped and fell down the stairs as he was carrying Sierra. The emergency room records note that no abuse was suspected since Roberts' story was consistent with Sierra's injuries. However, because of the frequency of injuries sustained by her, Sierra's pediatrician, Dr. Rakesh Dua, reported this incident as possible child abuse to the State Central Register on May 30, 2003, and ACS reopened its case file on Sierra and undertook a two-month investigation which included review of the medical records, home visits and interviews with Sierra, social workers, her foster parents and Roberts. No evidence of abuse or mistreatment was found and ACS concluded that Sierra appeared to be safe and not at risk of immediate harm.

There were no further accidents or reports of child abuse for over two years thereafter, until the fatal assault in October 2005.

Plaintiff, Sierra's maternal aunt, seeks damages for negligence on the part of defendants in the investigation of Dr. Dua's 2003 report of possible child abuse.

Negligent investigation is not a cognizable cause of action (see Coleman v Corporate Prevention Assocs. Inc., 282 AD 2d 703 [2nd Dept 2001]; Coyne v State, 120 AD 2d 769 [3rd Dept 1986]; Sean M. v City of New York, 20 AD 3d 146 [1st Dept 2005]). Moreover, since the manner of performing the investigation and the conclusions and determination made were discretionary acts of the ACS caseworkers

involving their judgment, they may not form the basis of liability, even if the caseworkers were negligent(see McLean v City of New York, 12 NY 3d 194 [2009]; see also Dinardo v City of New York, 13 NY 3d 872 [2009], concurring ops of Lippman, J. and Ciparick, J.; Sean M. v City of New York, supra at 156; Rivera v City of New York, 82 AD 2d 647 [2nd Dept 2011]).

The cases cited and discussed by respective counsel that recite the established law that municipalities and foster care agencies may be sued for their negligent supervision of children in foster care if it is established that they had sufficiently specific knowledge or notice of the dangerous conduct which caused the injury, inter alia, McCabe v Dutchess County (72 AD 3d 145 [2nd Dept 2010]), Liang v Rosedale Group Home (19 AD 3d 654 [2nd Dept 2005]) and Lilian C. v Administration for Children's Services (48 AD 3d 316 [1st Dept 2008]), are inapposite to the facts of this case since this is not a case involving a claim of negligent supervision.

Finally, since the manner in which ACS conducted the investigation of Dr. Dua's report of potential child abuse and the determination of ACS constituted acts of discretion, the concept of special duty, which respective counsel also devote space in their affirmations discussing, does not apply (see McLean v City of New York, supra; Dinardo v City of New York, supra).

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, 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).

Discretionary acts of a governmental entity, as opposed to merely ministerial acts, may never form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). Governmental immunity for discretionary acts applies where the municipality establishes that the actions resulted from discretionary decision-making, which is "the exercise of reasoned judgment which could typically produce different acceptable

results" (Valdez v City of New York, 18 NY 3d 69, 79 [2011] [internal citation omitted]). Moreover, merely because a public employee's discretionary act, in retrospect, was a bad judgment call and was even negligent, such does not result in liability (see Kenavan v City of New York, 70 NY2d 558 [1987]; Artalyan, Inc. v. Kitredge Realty Co., Inc., 52 AD 3d 405 [1st Dept 2008]).

Even if, arguendo, the law of special duty were applicable to the facts of this case, plaintiff has failed to demonstrate that there was a special relationship between defendants and Sierra.

"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, supra at 199-200 (internal citation omitted).

There has been no allegation or showing that defendants violated any statute enacted specially for Sierra's benefit or the benefit of a limited class of children of which Sierra was a member(see Vitale v City of New York, 60 NY 2d 861 [1983]; see also Shante D v City of New York, 190 AD 2d 356 [1st Dept1993]).

There has also been no showing or allegation that a special duty arose out of the third basis, namely, the assumption of positive direction and control in the face of a known, blatant and dangerous safety violation. No specific safety violation is cited.

Moreover, there is no showing, on this record, that defendants voluntarily assumed an affirmative duty that induced detrimental reliance on the part of Sierra. 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). Plaintiff has failed to proffer any facts to establish these elements.

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]).

The foregoing analysis of the special duty rule, however, is academic in light of the fact that the investigation that was allegedly negligently performed involved acts of discretion and judgment.

This Court does not reach, and will not decide, the issues of whether the investigation that was conducted was performed negligently or whether defendants had notice that Roberts posed a danger to Sierra.

Accordingly, the action is dismissed.

Dated: May 5, 2014

KEVIN J. KERRIGAN, J.S.C.