

**Kinsey v City of New York**

2015 NY Slip Op 30990(U)

May 12, 2015

Supreme Court, Bronx County

Docket Number: 306534/2009

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

BAKARI M. KINSEY,

INDEX NUMBER: 306534/2009

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
Justice

**THE CITY OF NEW YORK, NEW YORK CITY  
EMERGENCY MEDICAL SERVICES, "JOHN DOE  
I-III" Emergency Medical Services personnel whose  
identity is presently unknown, NEW YORK CITY  
FIRE DEPARTMENT, NEW YORK CITY POLICE  
DEPARTMENT and JOHN DOE IV-VI Police  
Officers who identity is presently unknown,**

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 9/8/14

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is granted for the reasons set forth herein.

Plaintiff brings this action alleging serious personal injuries as a result of police officers with the New York City Police Department (hereinafter "NYPD") and the New York City Emergency Medical Services (hereinafter "EMS") failing to restrain him and allowing him to escape from an ambulance. Plaintiff also alleges that the actions taken by the police caused him to fall from the roof of a building and sustain multiple

fractures.

On October 11, 2008, at approximately 3:15 p.m., Lt. Joseph Porco responded to a 911 call concerning an individual, plaintiff, on Manida Street, Bronx, New York. The call was dispatched for a 33 year old male with a possible mental history running up and down the block taking off his clothes. Lt. Porco testified that when he arrived, plaintiff was quiet and fully clothed. Plaintiff told him that he was exercising in the street doing some sprinting and push-ups. He asked plaintiff if he wanted to go to the hospital and plaintiff said yes. An ambulance arrived along with Sgt. Paul Donohue (now Lt. Donohue) and police officer Stephen Zupic. Plaintiff testified that he did not really want to go to the hospital but believed he would be arrested if he did not cooperate with the police. Police did not restrain him in any way because he did not present a threat to himself or others. Plaintiff got into the ambulance with Sgt. Donahue but minutes later he ran out of the side door of the ambulance. The testimony varies at this point. After plaintiff ran out of the ambulance, the police followed him up to the building but were unable to located him. Plaintiff testified that he tried to get back into his apartment but did not have the key with him so he ran up to the roof with the intent of climbing down the fire escape to his window. He further testified that the police were on the roof with their guns drawn. Sgt. Donahue testified that he saw plaintiff on the roof but went back downstairs for safety purposes. The police heard some glass breaking at the rear of the building and saw plaintiff climbing down form the roof and holding onto some cable wires. Plaintiff then fell to the ground and sustained multiple fractures.

Plaintiff testified at his 50-h hearing that he suffers from bipolar disorder and has been under a doctor's care since 2003. At his deposition, plaintiff testified that he has suffered from bipolar disorder since 2006. Plaintiff further testified that on the date of the incident, he had removed his shirt and was running around exercising doing push-ups and sprints to the corner of the block and back for about 30 minutes on Manida Street in the Bronx. He was "not feeling good" and was very angry but there was "no indication of me hurting anyone or myself at that time." When the police officers approached him, plaintiff told them that he had problems and needed help, but stated that he did not want to go to the hospital right then. However, the police "kind of like forced" him into the ambulance by saying "[c]ome on. Come on." Plaintiff felt like if he ran, he would be arrested so he was "cooperating with them." He was never placed in handcuffs or restrained in any way. He further testified that he was never told that he was under arrest and there was no indication that the police wanted to arrest him. The police told him that he would go to the hospital to get checked out and then he

would go home. Plaintiff acknowledged that he did not tell anyone that he had stopped taking the medications for his psychiatric condition. There were two emergency personnel in the back of the ambulance and plaintiff "felt uncomfortable" when he got inside the ambulance. He testified that he "was scared and I believe I'm claustrophobic too. I don't like tight situations, being close too much." "I didn't feel good... I felt like I was being taken away and I didn't want to get taken away. I felt afraid of all of them." Moments later, plaintiff told the police and ambulance personnel "I told you guys I don't want to go." Plaintiff was sitting on a metal bench in the rear of the ambulance while emergency medical technician Leon Goldson recorded plaintiff's vital signs and pedigree information. Sitting next to plaintiff, to his left, was a police officer and there was a side door to his right and Mr. Goldson was at the rear of the ambulance. While Mr. Goldson was speaking to plaintiff, plaintiff turned the knob on the side of the door of the ambulance, opened it and fled. The report prepared by Mr. Goldson indicates that the ambulance was moving, up to 10 miles per hour, when plaintiff fled. Plaintiff testified that after he fled the cops chased him. He ran into the building and was chased up five flights of stairs. Plaintiff ran to the roof because he did not want to be taken away. The police officers that were on the roof had their guns out pointed at him telling him "Don't move. Stop. Don't' move." Plaintiff wanted to go inside his house so he was going to go through the fire escape from the roof. However, as he was coming down the fire escape he slipped. He was holding on to a cable wire from the roof which broke causing him to fall four stories to the ground breaking several ribs, his right ankle and several lumbar vertebrae.

Lt. Joseph Porco, now retired, testified at a deposition that when he joined the police department, he received training in dealing with emotionally disturbed people (hereinafter "EDPs") in the academy and then continual training on various topics after that. He was given extensive training on how to respond to EDPs and how to make critical judgments about a particular EDP, as well as using restraining devices. When responding to an EDP, every situation is different and it would be up to him, as the supervising officer, to make the necessary judgment calls. Lt. Porco testified that the NYPD Patrol Guide is only a guide, it is not the absolute last word on how to deal with every situation. On the date of the incident, he heard a radio call regarding an EDP and he was the first to arrive on the scene. When he arrived, the street was quiet and there was one person in the area, the plaintiff. Lt. Porco approached the plaintiff and asked how he was doing and whether he had any mental problems and plaintiff indicated that he did. He then asked plaintiff if he wanted to go to the hospital and plaintiff said yes. He advised plaintiff that an ambulance was on its way and it arrived in approximately 10

minutes. During that time, plaintiff did not exhibit any unusual behavior and there was no need to set up a zone of safety. He walked away to speak with someone while keeping plaintiff under observation. Another police car arrived with Sgt. Donahue and police officer Zupic. He briefed them on what was happening and told them that plaintiff was “voluntary” and “wants to go to the hospital” and was giving him no problem. Lt. Porco did not feel that plaintiff was a danger to himself. Plaintiff voluntarily walked into the ambulance along with Sgt. Donahue. He saw EMS personnel put a seatbelt on plaintiff and then he left the scene. After leaving, Lt. Porco heard radio calls for assistance from officers and Manida Street and he returned to the area. There were numerous officers present and by that time, plaintiff had already fallen and had been taken into custody. After the fall, it was appropriate to classify plaintiff as a danger to himself and to restrain him.

Lt. Donahue testified at his deposition that when dealing with an EDP, a police officer may have to alter his approach to deal with the developing situation. He acknowledged that an EDP might be calm at first, but that can change and there may be circumstances where police initially decide not to employ restraints, but could later do so depending on the developments. With respect to the incident, when he arrived at the scene, he observed Lt. Porco speaking with plaintiff, standing around and waiting for an ambulance. After the ambulance arrived, Lt. Porco left the scene and he remained there with his partner, officer Zupic. Plaintiff walked into the ambulance and Lt. Donahue went in as well for the purpose of escorting EMS to the hospital. He and plaintiff were sitting approximately three to four feet apart, and he noticed that plaintiff undid his seatbelt, which was not a restraining device, and went out the side door. Lt. Donahue got out of the ambulance to see where plaintiff was going but was unable to locate him. The ambulance was parked directly in front of a building so he went into the building and conducted a “vertical” which is a floor-to-floor search. When he got to the roof, he saw plaintiff on the rooftop approximately two to three buildings over. At that point, he decided, for safety purposes, to go back downstairs to regroup with his partner and canvas together. Shortly thereafter, he heard glass breaking in the back alley and he and his partner went to the back of the building where they observed plaintiff on the side of the building holding on to some cable or telephone wires. Lt. Donahue radioed for the Emergency Services Unit (hereinafter “ESU”) but plaintiff fell before ESU arrived. Prior to plaintiff’s fall, he observed civilians on the roof, so he requested that some of the officers come to the roof in order to secure the area. After plaintiff fell, Lt. Donahue and a few other officers approached him. They attempted to restrain plaintiff but he was resisting. Eventually, they were able to put handcuffs on him. Once ESU arrived, its

personnel would be responsible for any further restraints if needed. The ESU officers placed plaintiff in a restraining bag so he could not kick. Plaintiff was never placed under arrest.

Officer Zupic testified at his deposition that on the date of the incident, he was partnered with Sgt. Donahue. When he arrived at the scene, he observed Lt. Porco standing near the ambulance. Sgt. Donahue got out of their patrol car and spoke with Lt. Porco after which Lt. Porco left the scene. At that point, there were no other officers on the scene. Before he exited the patrol car, officer Zupic observed plaintiff sitting in the back of the ambulance, on a bench seat and he appeared docile. Plaintiff appeared fully clothed and he had no recollection on whether he heard over the radio that plaintiff was previously running around naked. In his opinion, there was no need to set up a zone of safety to isolate plaintiff. He testified that the mere fact that an officer is escorting an ambulance to the hospital does not mean that the EDP is in protective custody. Because Sgt. Donahue stated that he was going to ride in the ambulance, officer Zupic pulled the police car in front of the ambulance to clear the way. Through his peripheral vision, officer Zupic saw someone running towards the buildings and he saw Sgt. Donahue and EMS workers running. He exited his vehicle and ran into one of the buildings but the others were already out of sight. Officer Zupic hears someone yell that plaintiff was going to the roof and he decided to return to the ground floor in case plaintiff might try to come down a fire escape. When he did see plaintiff on the fire escape, officer Zupic went to the rear of the building and heard glass breaking and saw plaintiff standing on a windowsill holding onto a bundle of wires. Plaintiff was on the highest floor of the building and not near any fire escapes. Officer Zupic told plaintiff to hold on and not to jump, then Sgt. Donahue appeared at officer Zupic's side and called for ESU. Plaintiff began climbing down the wires and went a few feet before he fell. Officer Zupic then approached plaintiff who then attempted to grab Zupic around the legs as he was trying to get up, like he was trying to lunge forward trying to tackle him. He and other officers then got plaintiff's arms behind him and handcuffed him until ESU responded.

EMT Leon Goldson testified that he received training in dealing with EDPs and about schizophrenia, bipolar disorder and depression. On the date of the incident, the initial call came in as an EDP Category 7, meaning the person was not suffering from an immediate medical condition that might cause death. That day Goldson was acting as the "technician" which means he was responsible for filling out the paperwork, however, since he was new, Goldson's partner EMT Walters, did the paperwork. The police were already on the scene when the ambulance arrived and Goldson was informed that plaintiff had been exercising naked on the

block but had put his clothes back on. Plaintiff appeared calm and relaxed and when the police asked plaintiff if he wanted to go into the ambulance and he obliged. Plaintiff went into the ambulance and allowed Goldson to take his blood pressure, check his heart and listen to his lungs without any issues. He was not very talkative but was cooperative. Goldson testified that if an EDP is behaving calmly, EMS will not restrain him as restraints are used when it appears that an individual presents a danger to himself or other. The decision of whether or not to use restraints can be made either by the police or the emergency medical technicians. In this case, plaintiff was calm and indicated that he was willing to go to the hospital so plaintiff was not restrained and Goldson's partner put on plaintiff's seatbelt. As they started to pull away, plaintiff undid his seatbelt and jumped out of the ambulance. Goldson saw him run into a building, and Goldson and a police officer ran after him. They ran all the way to the roof, but he could not see plaintiff. As they went back down, they heard the sound of breaking glass in an adjoining building. They went to the back of the building at which time Goldson saw plaintiff hanging from a cable wire and heard plaintiff screaming "[m]y ribs, my ribs" and Goldson and his partner told him "[d]on't move. We're coming right back." Goldson and his partner returned to the ambulance to gather further equipment and by the time he returned, plaintiff and already fallen.

Inspector Donald McHugh testified that he investigated the incident and prepared the unusual occurrence report. He arrived at the scene after plaintiff had fallen. He testified that all police cases are "fluid" and the an EDP situation has a higher degree of "fluidity". Officer are to use subjective judgment as to whether physical force is required with an EDP. With respect to his report, Inspector McHugh testified that no handcuffs were used as plaintiff volunteered for medical treatment.

Defendants seek to dismiss plaintiff's complaint on the grounds that no special relationship existed between the City and the plaintiff; that the City is immune from liability for its discretionary decisions in the provision of emergency police and medical assistance; and, plaintiff's injury was unforeseeable. Defendants also argue that any claims of special duty and any allegations as to negligent after plaintiff ran from the ambulance must be dismissed at they were not contained in the Notice of Claim

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1<sup>st</sup> Dept. 1997).

In cases predicted on governmental functions such as the failure to provide police protection and emergency medical services, a plaintiff must prove that a special relationship was established between the injured party and the municipality. Valdez v. City of New York, 18 N.Y.3d 69 (2011)(Under the public duty rule, although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created); Applewhite v. Accuhealth, 21 N.Y.3d 420 (2013). “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 N.Y.3d 186 (2004). The elements of a “special relationship” are “(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 N.Y.2d 255, 260 (1987).

“To sustain liability against a municipality, the duty breached must be more than that owed the

public generally”. Lauer v. City of New York, 95 N.Y.2d 95 (2000). “A public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent”. Lauer, 95 N.Y.2d at 99. In other words, even if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority. Valdez, 18 N.Y.2d at 76. “Government 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, apart from any duty to the public in general.” McLean v. City of New York, 12 N.Y.3d 194 (2009).

Defendants’ motion for summary judgment must be granted. Plaintiff fails to raise any questions of fact regarding whether a special relationship existed between plaintiff and the NYPD. The affidavit of Thomas Hoskins, a retired New York City police officer, submitted by plaintiff fails to set forth that a special relationship existed between plaintiff and the police officers who responded to the scene. Mr. Hoskins’ affidavit fails to set forth any facts showing that he is particularly qualified to render expert testimony on the interpretation of the New York City Police Department Patrol Guide or demonstrate any specific expertise in dealing with potential EDPs. Mr. Hoskins merely states that he is a retired police officer who was appointed to the force in 1982, achieved the rank of Lieutenant in 1992 and retired in 2010; and that as a supervisor, he responded to approximately 200 to 300 calls for EDPs. Thus, since Mr. Hoskins’ affidavit represents nothing more than his own personal opinion that police should have realized that plaintiff needed to be restrained and that the ambulance door should have been locked, it is without any probative value. See, Diaz v. New York Downtown Hospital, 99 N.Y.2d 542 (2002)(Where the expert’s ultimate conclusions are speculative or unsupported by any evidentiary foundation the opinion should be given no probative force and is insufficient to withstand summary judgment); Romano v. Stanley, 90 N.Y.2d 444 (1997)(Affidavit of plaintiff's expert had no probative force and was not sufficient by itself to defeat summary judgment where there was nothing in expert's affidavit from which validity of ultimate conclusions could be inferred and the professional background of expert was not alone sufficient to lend credence to his opinion). Moreover, Mr. Hoskins’ references to the New York City Police Department Patrol Guide §PG 216-05 “Mentally Ill or Emotionally Disturbed Person” are also devoid of merit as, contrary to the plaintiff's contention, the regulations in the New York City Police

Department Patrol Guide do not establish clear legal duties which would serve as a basis for imposing liability on defendants. See, Carroll v. City of New York, 730 N.Y.S.2d 548 (2d Dept. 2001) citing Galapo v. City of New York, 95 N.Y.2d 568 (2000)(The Police Department Patrol Guide is not a body of law or regulation establishing clear legal duties that should serve as a basis for civil liability of municipalities) .

In the instant matter, despite the 911 call that a male with a possible mental history was running up and down the block taking his clothes off, the evidence clearly shows that when the police and emergency medical technicians encountered plaintiff, he was dressed and quiet. Plaintiff told Lt. Porco that he was exercising in the street doing some sprinting and push ups. When asked by Lt. Porco if he wanted to go to the hospital, plaintiff agreed. Plaintiff then waited with Lt. Porco for 10 minutes for the ambulance to arrive during which time plaintiff did not exhibit any unusual behavior. Plaintiff went into the ambulance of his own accord. He did not have to be physically brought into the ambulance. EMT Goldson testified that plaintiff appeared calm and relaxed in the ambulance, and he was quiet and cooperative while Goldson took his blood pressure, checked his heart rate and listened to his lungs. Police officer Zupic noted that plaintiff appeared docile while sitting in the ambulance. Therefore, there is no evidence that defendants had knowledge or should have known that plaintiff would become a danger to himself. Plaintiff himself testified that his behavior up until he left the ambulance indicated that he was not a danger to himself. He testified that he was "not feeling good" and was very angry, but there was "no indication of me hurting anyone or myself at that time."

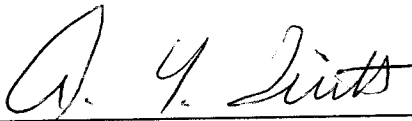
Furthermore, the actions of the police and EMS personnel were discretionary. Pursuant to Valdez and McLean, *supra*, a municipality is immune from liability for the discretionary actions of its employees, even if in hindsight, it appears they were negligent or resulted from poor judgment. See, also Kenavan v. City of New York, 70 N.Y.2d 558 (1987). The applicable provisions of the Patrol Guide provides discretionary language requiring police officers to use their judgment when determining if an individual qualifies as an EDP. The Patrol Guide defined an EDP as "a person who appears to be mentally ill or temporarily deranged and is conducting himself in a manner which a police officer reasonably believes is likely to result in serious injury to himself or others." It further provides that "[u]pon arrival at the scene [the responding officers should] assess [the] situation as to threat of immediate, serious physical injury to EDP, other persons present, or members of the service." Thus, by its own terms, the Patrol Guide permits the officers to make their own determination as to whether a person appears to be emotionally disturbed and assess the situation

upon arrival. The testimony of the responding officers demonstrates their exercise of discretion.

Accordingly, for the reasons set forth herein, defendants' motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of this Court.

Dated: 5/12/15



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**Hon. Alison Y. Tuitt**