

Trimble v City of Albany, N.Y.
2015 NY Slip Op 32720(U)
July 1, 2015
Supreme Court, Albany County
Docket Number: 2300-14
Judge: Gerald William Connolly
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

JUL 07 2015

CORPORATION
COUNSEL

JOHN TRIMBLE AND NICOLE TRIMBLE,
Plaintiffs,

DECISION AND ORDER

Index No. 2300-14
RJI No. 01-14-113654

-against-

THE CITY OF ALBANY, N.Y. AND DEPARTMENT
OF FIRE AND EMERGENCY SERVICES OF THE
CITY OF ALBANY, N.Y.,

Defendants.

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(Supreme Court, Albany County, All Purpose Term)

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Connolly, J.:

A fire occurred at plaintiffs' residence on the night of February 2, 2013 at 219 Lenox Avenue in the City of Albany. The Defendant Albany Department of Fire and Emergency Services responded to the fire. Plaintiffs allege in the complaint that at about 12:30 a.m. on February 3, 2013, they were advised that the fire had been fully extinguished and it was safe to enter the premises. They allege that they re-entered the house to secure the premises and remove certain personal belongings and left to spend the night with other relatives. They assert that later that morning they received a phone call from defendant alerting them that the residence was fully engulfed in flames and, upon their return, that the house had been completely destroyed by fire. Plaintiffs contend that the residence was destroyed by "rekindling" as a result of fire that had been overlooked or not discovered or fully extinguished by defendants. The complaint asserts

that a “special relationship” was created and that defendants were under a duty to exercise reasonable care to the plaintiffs and their property. Plaintiffs assert that as the result of defendants’ negligence they have suffered damages to their real and personal property. Defendants have moved to dismiss the complaint. Plaintiffs have cross-moved for leave to amend the complaint. The Court, by letter dated October 20, 2014 (McNamara, J.), converted the defendants’ motion to dismiss to a motion for summary judgment addressed to the issue of whether defendants are entitled to governmental immunity and gave the parties additional time to address such conversion.¹

Defendants assert that plaintiffs have failed to establish the existence of a special relationship between plaintiffs and defendants but, even if such special relationship was established, as defendants were performing a discretionary governmental function, such action must be dismissed as defendants are immune from liability. Plaintiffs have cross-moved seeking an order, *inter alia*, granting plaintiff leave to amend the complaint.

Leave to Amend the Complaint

While leave to amend is generally “freely granted” (*see Smith v Haggerty*, 16 AD3d 967, 967-968 [2005]), such leave rests within the trial court’s discretion (*see Moon v. Clear Channel Communications, Inc.*, 307 AD 2d 628 [3d Dept. 2003]). Plaintiffs seek to amend the complaint to “clarify allegations that the municipality failed to properly follow routing protocol and

¹Such October 20, 2014 letter provides, *inter alia*, “[m]otions to dismiss for failure to state a cause of action and for leave to amend the complaint are currently pending. After researching the issue of whether a ‘special relationship’ exists, as is raised by the motion to dismiss, the court has concluded that the motion to dismiss should be converted to a motion for summary judgment (CPLR 3211[c]) addressed to the issue of whether defendant is entitled to governmental immunity. Specifically to be addressed is the question of whether defendant’s efforts in extinguishing the fire at plaintiffs’ residence were discretionary in nature (*see Harland Enterprises, Inc. v. Commander Oil Corp.*, 64 NY2d 708 [1984] and consequently, may not be a basis for liability (*McLean v City of New York*, 12 NY3d 194, 203 [2009]”).

personnel procedures and that the Defendants' failure to properly engage in these ministerial functions directly caused the damages sustained by Plaintiffs" (which they assert was already alleged in the original Verified Complaint). Upon review of the amended complaint, the Court denies the plaintiffs motion to amend as such amendment consists of additional factual allegations. As such factual issues can be raised by plaintiffs in conjunction with the summary judgment motion, and plaintiffs are not seeking to add a new claim or cause of action, the motion to amend is denied as immaterial (*see Id.*).

Summary Judgment

The Court is mindful that summary judgment is a drastic remedy which should only be granted when there clearly are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). It is well-settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If such right to judgment is established, the burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), and all evidence must be viewed in the light most favorable to the opponent to the motion (*see Crosland v. New York City Transit Auth.*, 68 NY2d 165 [1986]).

The defense of governmental function immunity must be considered only after it is determined that a special relationship has been demonstrated among the parties (*see Valdez v*

City of New York, 18 NY3d 69 [2011], and, accordingly, the Court must initially examine defendants' summary judgment argument concerning a special duty. "When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties. A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises. In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers ... Police and fire protection are examples of long-recognized, quintessential governmental functions" (*Applewhite v Accuhealth, Inc., et al.*, 21 NY3d 420, 425 [2013]). "If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a "special duty" to the injured party. The core principle is that to sustain liability against a municipality, the duty breached must be more than that owed to the public generally" (*Id.* at 426 [internal citations and quotations omitted]). A special duty can arise in three situations: (1) where the plaintiff belonged to a class for whose benefit a statute was enacted; (2) where the government entity took control of a known and dangerous safety condition; and (3) where the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally. (*Id.*) Defendants contend that plaintiffs cannot demonstrate the existence of a special duty (i.e. that the government entity voluntarily assumed a duty to plaintiff beyond what was owed to the public generally).

"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.” (*Valdez v City of New York, et al.*, 18 NY3d 69, 75 [2011]).² Such special duty is demonstrated where a special relationship has been demonstrated via “(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 NY2d 255, 260 [1987]).

Defendants allege that plaintiffs’ cannot establish the existence of a special relationship, while plaintiffs contend that the complaint alleges that the municipality through promises and/or actions, assumed an affirmative duty to act on behalf of plaintiff, that they had knowledge that inaction could lead to harm, direct contact between the municipality’s agents in that defendant’s representatives advised plaintiffs that the fire had been fully extinguished, and the plaintiffs justifiably relied upon the municipality’s affirmative undertaking as they re-entered the premises and left the premises without providing additional protection to their property based upon the representation that the fire had been fully extinguished.

Defendants assert that they did not assume a duty above and beyond the ordinary work of the governmental actor. They contend that even assuming that the defendants made a representation that the fire was extinguished, such statement does not equate to an assumption of a duty by the City, and, further, when the plaintiffs re-entered their home to secure the premises,

²It has been held that ... “the duty to provide protection against fire, flows only to the general public”, and, accordingly, a municipality cannot be held liable for failure to provide such protection, unless a special duty exists (*see Florence v. Goldberg*, 44 NY2d 189 [1978]).

any purported duty ceased to exist. Based upon the record including the allegations of the complaint, defendants have demonstrated a *prima facie* entitlement to summary judgment dismissing such negligence claim. The courts have not imposed general liability to the public for civil damages resulting from the failure to supply adequate fire protection (*see Helman v County of Warren*, 111 AD2d 560 [3d Dept 1985]). While plaintiffs assert in their complaint that a special relationship was created via representations that the fire was extinguished, the fire protection provided to plaintiffs was a protection that was intended to protect all members of the general public (*see Id.*; *see also O'Connor v City of New York*, 58 NY2d 184 [1983]). To the extent, in opposition, plaintiffs assert that they relied upon the representations that the fire was extinguished and re-entered the home, such reliance and representations again relate to the adequacy of the fire protection provided and cannot be said to create a special relationship. Such assertions fail to raise a triable issue of fact precluding summary judgment.

Even assuming, however, that triable issues of fact exist as to whether a special duty existed, defendants are entitled to summary judgment based upon governmental function immunity. The availability of governmental function immunity depends upon whether the conduct giving rise to the claim is related to an exercise of discretion (*see Valdez v City of New York*, 18 NY3d 69 [2011]). “The defense precludes liability for a mere error of judgment but this immunity is not available unless the municipality establishes that the action taken actually resulted from discretionary decision-making – i.e. the exercise of reasoned judgment which could typically produce different acceptable results.” (*Id.* at 79-80). Ordinarily, “[a] fire department is not chargeable with negligence for failure to exercise perfect judgment in discharging the governmental function of fighting fires”. (*Harland Enterprises, Inc. v Commander Oil Corp.*, 64 NY2d 708 [1984]; *see also, McGee v. Adams Paper & Twine Co.*, 26 A.D.2d 186 [1st Dept 1966], *aff'd* at 20 N.Y.2d 921 [1967]).

In support of its application for summary judgment, defendants have introduced the affidavit of William M. Moore, the Battalion Chief of the City of Albany, Department of Fire and Emergency Services, who responded to the fire at issue in this action. He avers, *inter alia*, that “at approximately 12:11 am, based on reports I received from members of the on scene companies and my own observations of the residence I declared that the fire was under control.” He further avers that thereafter, he assigned all companies on scene to participate in an “overhaul” of the building which consisted of the utilization of numerous techniques and equipment to check for extension of the fire throughout the rest of the house, interior and exterior, and that based upon reports he received and his own inspection of the home, he turned the scene over to the Fire Investigation Unit to determine the cause and origin of the fire. Based upon the record, defendants are entitled to summary judgment dismissal of the action having demonstrated that the determination to leave the plaintiffs’ property and the cessation of the fire-fighting activities was a decision that depended on the use of discretion and judgment.

In opposition, plaintiffs have failed to raise a triable issue of fact sufficient to preclude summary judgment. While they have submitted the affidavit of Thomas Murl, a Certified Fire and Explosion Investigator and Instructor who opines that the defendants failed to “follow and/or adhere to certain ministerial protocols and Standard Operating Procedures” including protocols set forth in, *inter alia*, the “Firefighter’s Handbook Essentials of Firefighting and Emergency Response New York Edition” (produced by defendants in response to plaintiffs’ subpoena), such opinions fail to raise a triable issue of fact. While plaintiffs assert that such issues exist as to whether the firefighter’s procedures and protocols were followed, plaintiffs have not demonstrated, other than by conclusory opinion, that the requirements of such protocols are not subject to the use of discretion and judgment by the firefighters involved nor, that plaintiffs are not entitled to the exercise of discretion with respect to the tactical decisions made concerning

the fire-fighting activities at issue herein (*see Pascarella v. New York*, 146 AD2d 61, 70 [1st Dept 1989]; *see also McGee v Adams Paper & Twine Co.*, 26 AD2d 186, 198 [2nd Dept 1966]).

Further, plaintiffs have not raised a triable issue of fact as to whether the inherently discretionary determination by the Battalion Chief, that the fire-fighting activities should be ceased and that the firefighters should leave the property, was made based upon Chief Moore's judgment of the overall state of the house at issue. While such determination may have ultimately proved incorrect, it cannot be said that a triable issue of fact has been raised concerning whether such determination was ministerial or discretionary. Accordingly, defendants are entitled to summary judgment dismissing the complaint.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

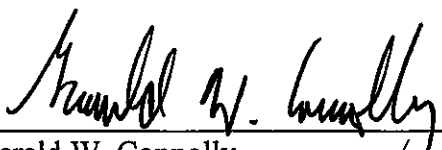
Accordingly, it is hereby

ORDERED that the complaint is dismissed and the relief requested therein is in all respects denied.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the defendants' counsel. A copy of this Decision and Order together with all other papers are being forwarded to the County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED
ENTER.

Dated: July 1, 2015
Albany, New York


Gerald W. Connolly
Acting Justice of the Supreme Court

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