

Vassenelli v City of Syracuse
2015 NY Slip Op 32836(U)
June 18, 2015
Supreme Court, Onondaga County
Docket Number: 2014EF97
Judge: Hugh A. Gilbert
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At a Term of Supreme Court held in
and for the County of Onondaga,
in the City of Watertown, New York.

PRESENT: HONORABLE HUGH A. GILBERT
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NICHOLAS L. VASSENELLI,

Plaintiff,

MEMORANDUM
DECISION AND ORDER

Index No. 2014EF97
RJl No. 33-14-0960

-vs-

THE CITY OF SYRACUSE, STEPHANIE A. MINER,
in her individual and official capacity as Mayor of The
City of Syracuse, FRANK L. FOWLER, in his individual
and official capacity as Chief of Police for The City
of Syracuse, JUDY CULETON, in her individual capacity
as former Director of the Human Resources Division of
the Syracuse Police Department, MATTHEW DRISCOLL,
in his individual capacity as former Mayor of The City of
Syracuse, GARY MIGUEL, in his individual capacity as
former Chief of Police for The City of Syracuse, SERGEANT
RICHARD PERRIN, in his individual and official capacity,
POMCO GROUP a/k/a POMCO, INC., individually and as
an agent for The City of Syracuse, SHARON MILLER, in
her individual capacity as a former agent of the City of
Syracuse and SHARON ERIKSSON, in her individual
capacity as a former agent of the City of Syracuse,
DAVID BARRETTE, in his individual and official capacity
as a Deputy Chief of the City of Syracuse Police
Department, SERGEANT MICHAEL MOUREY, in his
individual and official capacity as the employee in charge
of the Medical Section of the City of Syracuse Police
Department; PMA MANAGEMENT CORP.; CAROL WAHL;
and JOHN DOE(S) and JANE DOE(S),

Defendants.

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The Plaintiff seeks to restore Plaintiff's Amended Complaint against all Defendants and directs the attention of the Court to CPLR 2221(d)(2). The Plaintiff acknowledges his burden of establishing that this Court misapprehended the law or the facts in granting the Defendants' prior motions to dismiss. **Amato vs. Lord & Taylor, Inc.**, 10 AD3d 374, 375 (2004).

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The Court refers to its recital of facts and law in open Court prior to the May 22, 2015 oral argument and incorporates it by reference to the same effect and result as if it was fully set forth herein below in its entirety.

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This Court respectfully determines, in its discretion, that a tort duty of care to Plaintiff was not assumed by Defendants PMA Management Corp. or Carol Wahl based upon launching a force or instrument of harm or Plaintiff detrimentally relying on the continued performance of the contracting party's duties, or the contracting party entirely displacing the other party's duty, or any assertion of negligent misrepresentation. **Eaves Brooks Costume Company, Inc. vs. Y.B.H. Realty Corp.**, 76 NY2d 220, 222-23 (1990). Plaintiff did not allege the requisite fraud, collusion or other special circumstances sufficient to render these Defendants subject to suit for negligent performance by them to this Plaintiff who did not contract with them. **O'Brien vs. Lerman**, 117 AD2d 658, 658-59 (1986). The duty of these Defendants to their contracting party did not extend to establish

the requisite privity with Plaintiff. ***Murray Goldner vs. Kemp Insurance Company***, 125 AD2d 954, 954-55 (1986).

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This Court respectfully determines, in its discretion, that a tort duty of care to Plaintiff was not assumed by Defendants Pomco Group a/k/a Pomco, Inc., and Sharon Miller for these same reasons recited above. Furthermore, the establishment of a tort duty by a drug testing laboratory to the subject of a drug test for negligently testing that subject's biological specimen notwithstanding the absence of a formal contractual relationship between the drug testing laboratory and the subject of the drug test, ***Landon vs. Kroll Laboratory Specialists, Inc.***, 91 AD3d 79, 80 (2011), is readily distinguished from this case and compatible with the underlying premise that "in reaching the policy judgment called 'duty', Courts have therefore invoked a concept of privity of contract as a means of fixing fair, manageable bounds of liability in such cases".

This Court respectfully determines, in its discretion, that CPLR §3211(a)(7) applied to the Amended Complaint as it was addressed to Defendants City of Syracuse, Stephanie Miner, Frank Fowler, Judy Culeton, Matthew Driscoll, Gary Miguel, Sergeant Richard Perrin, David Barrette and Michael Mourey. A motion to dismiss the third and fourth causes of action was made and the Court concurred with the arguments set forward on behalf of these Defendants.

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Furthermore, any common law negligence cause of action by such an injured policeman is barred on the ground he received salary and medical benefits pursuant to General Municipal Law §207-c. **Brady vs. City of New Rochelle**, 296 AD2d 365, 366 (2002). Plaintiff then has a property right to payment of these benefits. **Matter of DeMasi**, 34 AD3d 472, 473 (2006). Section 207-c benefits are applied for and determined in a manner identical to worker's compensation benefits. **O'Dette vs. Parton**, 190 AD2d 1074, 1075 (1993). Although not discussing any other potential remedies, the municipality has no tort duty regarding the amount and nature of these benefits for an enrolled Plaintiff. Accepting the facts alleged in the Complaint as true, according the Plaintiff the benefit of every possible favorable inference, these alleged facts do not fit within any cognizable legal theory of negligence or gross negligence. **Turkat vs. Lalezarian Developers, Inc.**, 52 AD3d 595, 595-596 (2008).

The Court further finds that it did not overlook any fact or law with regard to the City and these Defendants, nor in the February 25, 2015 Order granting Defendant Sharon Eriksson's motion to dismiss.

THEREFORE, it is

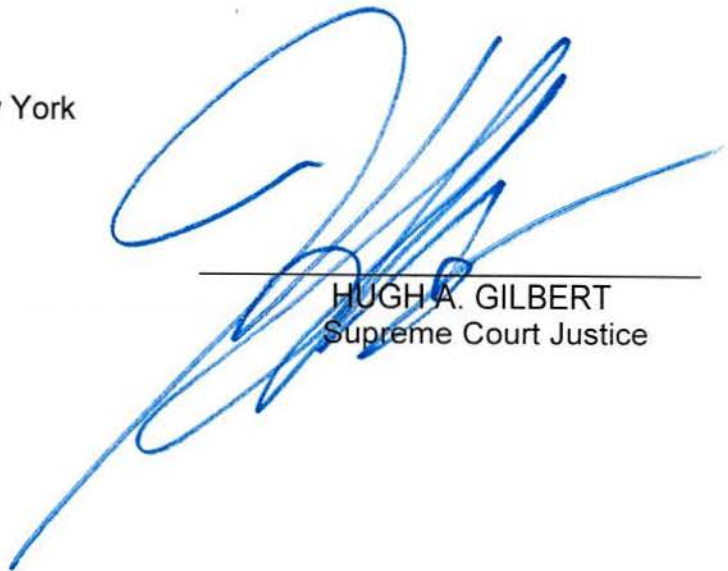
ORDERED, ADJUDGED AND DECREED that the motion of Plaintiff

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for an Order pursuant to CPLR §2221(d)(2) in Plaintiff's favor reversing the dismissal and restoring Plaintiff's Amended Complaint is respectfully denied.

Dated: June 18, 2015
at Watertown, New York

ENTER



HUGH A. GILBERT
Supreme Court Justice