

Estate of Rahman v ICS of Albany. Inc.
2016 NY Slip Op 32899(U)
March 31, 2016
Supreme Court, Albany County
Docket Number: 900407-15
Judge: James H. Ferreira
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ESTATE OF ASHIQUR RAHMAN, by
MIZANUR RAHMAN, as Administrator, and
MORIAM AKTHER,

Plaintiffs,

DECISION & ORDER

Index No.: 900407-15

RJI No.: 01-15-118265

-against-

ICS OF ALBANY, INC. and JAMES P. KELLY,
Defendants.

ICS OF ALBANY, INC. and JAMES P. KELLY,
Third-Party Plaintiffs,

-against-

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CITY OF ALBANY and JANE DOE,
Third-Party Defendants.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Heather S. Lanza, Esq.
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HON. JAMES H. FERREIRA, Acting Justice:

In this action, plaintiffs seek damages arising from a vehicle-pedestrian accident that occurred

on February 12, 2015 at or near the intersection of Central Avenue and Quail Street in the City of Albany, New York. Plaintiffs allege that plaintiff Moriam Akther and her son, Ashiqur Rahman (hereinafter decedent), were pedestrians in the intersection when they were struck by a 2002 Mack truck owned by defendant ICS of Albany, Inc. and operated by defendant James P. Kelly (hereinafter Kelly). Plaintiffs allege that Akther suffered serious injuries and decedent died as a result of the accident.

Following commencement of this action, defendants commenced a third-party action against third-party defendants City of Albany (hereinafter the City) and Jane Doe, alleged to be an employee of the City assigned as a crossing guard at the subject intersection at the time of the accident. Defendants allege that third-party defendants negligently breached their assumed duty of care to supervise pedestrian crossings at the subject intersection and that such breach caused or contributed to the accident which is the subject of plaintiffs' complaint. Specifically, defendants allege that, at the time of the accident, Kelly was attempting to turn his vehicle onto Central Avenue from Quail Street. They allege that, in the ordinary course of business and on numerous prior occasions, a crossing guard was present at the subject intersection and would step into the street to alert Kelly that a pedestrian was planning to cross the street. They further allege that, prior to making his turn on the date of the accident, Kelly "observed that the crossing guard was present at the accident location and standing on the corner speaking to pedestrians," that the crossing guard did not alert Kelly to plaintiffs' intention to cross through the intersection, and that Kelly "affirmatively relied upon the fact that [the crossing guard] was not preventing his turn or signaling him that pedestrians were crossing and believed it was safe for him to proceed" (Third-Party Complaint ¶ 16). As such,

defendants allege that third-party defendants breached their duty of care to Kelly and that the crossing guard's actions and inactions caused or contributed to the accident. Defendants seek contribution, indemnification and/or apportionment of liability in the event that plaintiffs recover a judgment against defendants.

In lieu of an answer, third-party defendants now move to dismiss the third-party complaint pursuant to CPLR 3211 (a) (7) on the ground that it fails to state a cause of action. Specifically, third-party defendants assert that defendants have failed to sufficiently allege facts establishing that third-party defendants owed a special duty to defendants. They further argue that, even assuming the existence of a special duty, third-party defendants are immune from liability because they were performing a discretionary governmental function. Defendants oppose the motion, and third-party defendants have filed a reply.

In considering a motion to dismiss pursuant to CPLR 3211 (a)(7), “the complaint is liberally construed, the facts as alleged are accepted as true and the plaintiff is accorded the benefit of every favorable inference” (Murray Bresky Consultants, Ltd v New York Compensation Manager's Inc., 106 AD3d 1255, 1258 [3d Dept 2013]; see Leon v Martinez, 84 NY2d 83, 87-88 [1994]). The inquiry before the Court is “whether the facts as alleged in the claim fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d at 87-88; see IMS Engrs.-Architects, P.C. v State of New York, 51 AD3d 1355, 1356 [2008], lv denied 11 NY3d 706 [2008]).

In the third-party complaint, defendants assert a claim for indemnification, contribution and/or apportionment based upon allegations that third-party defendants were negligent with respect to their supervision of pedestrian crossings at the subject intersection. “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” (Applewhite v Accuhealth, Inc., 21 NY3d 420, 425 [2013]). It is well-settled – and the parties here do not argue otherwise – that traffic control or regulation “is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers” (Balsam v Delma Eng’g Corp., 90 NY2d 966, 968 [1997]; see Murchison v State of New York, 97 AD3d 1014, 1016 [3d Dept 2012]; Devivo v Adeyemo, 70 AD3d 587 [1st Dept 2010]). Where, as here, a municipality engages in 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 the public generally’ ” (Applewhite v Accuhealth, Inc., 21 NY3d at 426, quoting Valdez v City of New York, 18 NY3d 69, 75 [2011]; see Williams v Weatherstone, 23 NY3d 384, 402 [2014]; Bynum v Camp Bisco, LLC, 135 AD3d 1060, 1061 [3d Dept 2016]).

“[A] special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition” (Applewhite v Accuhealth, Inc., 21 NY3d at 426).

Here, defendants argue that the complaint sufficiently alleges facts demonstrating the existence of a special relationship between Kelly and third-party defendants under the second

category.¹ To establish a special duty under this category, the injured party must prove: “ ‘(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’ ” (Valdez v City of New York, 18 NY3d at 80, quoting Cuffy v City of New York, 69 NY2d 255, 260 [1987]). “The requirement of direct contact serves to rationally limit the class of citizens to whom the municipality’s special duty extends and is necessary to establish a special relationship beyond that which all citizens share with government” (Bogart v Town of New Paltz, 145 AD2d 110, 113 [3d Dept 1989], lv denied 74 NY2d 608 [1989]; see Cuffy v City of New York, 69 NY2d at 261).

Upon review, the Court finds the allegations set forth in the complaint, even taken as true and construed liberally, insufficient to state a claim for negligence against third-party defendants. Specifically, the third-party complaint lacks any factual allegations that there was any direct contact between the crossing guard who was present at the scene of the accident and Kelly. Defendants do not allege that Kelly had any contact with the crossing guard on the date of the subject accident; indeed, defendants’ allegation is that the crossing guard who was present at the scene did not signal him that day. They allege only that, on prior occasions, a crossing guard present at the subject intersection – not necessarily the same crossing guard who was present on the date of the accident – had alerted Kelly that there was a pedestrian intending to cross the intersection. The facts as

¹ The Court notes that the third-party complaint does not allege – and defendants do not argue – that third-party defendants had a special duty to plaintiffs.

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alleged by defendants provide no basis to distinguish Kelly from any other driver on the road that day. Without more, the Court finds defendants' allegations insufficient to provide a basis for a finding that a special relationship existed between Kelly, a truck driver traveling in the intersection, and the crossing guard present at the intersection (see Kovit v Estate of Hallums, 4 NY3d 499, 507 [2005]). As such, the third-party complaint fails to state a cause of action and must be dismissed.


Accordingly, based upon the foregoing, it is hereby

ORDERED that third-party defendants' motion to dismiss the complaint is granted in its entirety and the third-party complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for third-party defendants. A copy of the Decision and Order has been delivered to the County Clerk for placement in the file. The signing of this Decision and Order, and delivery of a copy shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED
ENTER.

Dated: Albany, New York
March 31, 2016



Hon. James H. Ferreira
Acting Justice of the Supreme Court



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Papers Considered:

1. Notice of Motion, dated September 15, 2015;
2. Affirmation in Support by Eric P. Sugar, Esq., dated September 15, 2015, with attached exhibits;
3. Memorandum of Law in Support by Eric P. Sugar, Esq., dated September 15, 2015;
4. Affirmation in Opposition by Heather S. Lanza, Esq., dated October 30, 2015;
5. Memorandum of Law in Opposition by Heather S. Lanza, Esq., filed October 30, 2015; and
6. Memorandum of Law in Reply by Eric P. Sugar, Esq., dated November 5, 2015.