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| Lee v City of New York |
| 2017 NY Slip Op 30247(U) |
| February 2, 2017 |
| Supreme Court, New York County |
| Docket Number: 150448/14 |
| Judge: Lynn R. Kotler |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 21

BRENDA LEE, JANICE LEE, JAMES LEE, CALVIN LEE
And VENUS LEE, As Next of Kin of JUANITA LEE, deceased

INDEX NO. 150448/14

MOT. DATE

- v -

MOT. SEQ. NO. 001, 002

THE CITY OF NEW YORK

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits No(s) 1, 2
Notice of Cross-Motion/Answering Affidavits — Exhibits No(s) 3, 4
Replying Affidavits No(s)

In this action, plaintiffs seek damages for the defendant's interference with the right of sepulcher. Plaintiffs, who are next of kin of the decedent Juanita Lee (the "decedent"), maintain that the decedent's remains were improperly kept by defendant over a six-day period during which Hurricane Sandy struck New York City. In motion sequence number 001, defendant The City of New York (the "City") moves pursuant to CPLR § 3212 for summary judgment. In motion sequence number 002, plaintiffs also move for summary judgment. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined and the motions have been timely filed after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 395 [1957]).

Under common law, right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial (Melfi v. Mount Sinai Hosp., 64 AD3d 26 [1st

Dated: 2/2/17

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Dept 2009]. The First Department has held that the elements of a right of sepulcher claim are: (1) interference with the next of kin's immediate possession of the decedent's body and (2) that the interference has caused mental anguish, which is generally presumed (*id* at 39).

The facts are largely undisputed. On October 28, 2012, the decedent passed away at home. The Office of the Chief Medical Examiner ("OCME") operates a morgue in the basement of Bellevue Hospital Center (the "Bellevue morgue"). OCME accepted the decedent's body as a claims only case¹ at 10:17pm on October 28, 2012. Rico Washington, a mortuary transporter, arrived at the decedent's home at 1:07am. The decedent's body was sealed at 1:28am and brought to the Bellevue morgue at 2:06am.

On October 28, 2012, Mayor Bloomberg issued an executive order for mandatory evacuation of low-lying areas in Zone A based upon flood mapping data from the Federal Emergency Management Agency ("FEMA"). The Bellevue Hospital was in Zone B and therefore was not within the evacuation area. The City has provided the affidavit of Frank DePaolo, who was Assistant Commissioner of Emergency Management for OCME at the time. Mr. DePaolo explains the steps OCME took in preparation for Hurricane Sandy: "on Monday, October 29, 2012, bodies were removed from the lowest tier of the morgue to the next highest tier three feet above the ground. At that point, some water was beginning to come into the morgue."

Hurricane Sandy struck New York on Monday night, October 29. Sometime after the storm hit, Mr. Kearney, OCME's Director of Mortuary Services, learned that the entire Bellevue morgue had flooded up to the ceiling. Mr. Kearney testified that on the Wednesday after Hurricane Sandy hit, he observed that the basement of Bellevue Hospital was still flooded. Mr. DePaolo states that "the major flooding that ultimately occurred in the Bellevue Morgue, with water accumulating up to the ceiling, was completely unanticipated and unforeseeable, as to my knowledge such devastation had never previously occurred in that area."

On Saturday, November 3, Bellevue Hospital administration notified OCME staff that they could enter the Bellevue morgue the following day. On Sunday, November 4, Mr. Kearney and a crew of approximately 15 employees entered the Bellevue morgue, located and retagged all the remains and transported them to other locations. Between October 29, 2012 and November 4, 2012, none of the bodies at the Bellevue morgue were released from that site. On November 4, 2012, the deceased's body was transported to OCME's Queens facility and at 5:29pm that day, the funeral director hired by the deceased's next of kin (the "Lee family") retrieved the deceased's body.

The Lee family had planned to hold a funeral for the deceased on November 14, 2012 with an open casket. Plaintiffs maintain that due to the condition of the deceased's body, they had to have a closed casket funeral and could not bury the deceased, but instead had a cremation performed on November 10, 2012. Plaintiffs have provided the affidavit of Leanne Jones, who was a funeral director at the Florence E. Brown Funeral Home, Inc. at all relevant times. Ms. Jones states that "[b]eginning on October 30, 2012, and ending November 4, 2012, [she] made numerous, repeated calls to various OCME personnel and left messages that were not returned in order to attempt to take possession of [the decedent's] remains." Ms. Jones further states that she visited the Bellevue morgue at some point "during this period" to retrieve the decedent's remains but was informed "that this issue was not a pressing matter."

The City raises two arguments in support of its motion. First, the City contends that the mortuary services which OCME provided is a governmental function and alternatively, that the actions taken by OCME in preparing for Hurricane Sandy were discretionary and are therefore entitled to immunity.

¹ Meaning that the OCME agreed to transport and store the decedent's body until the next of kin was able to retrieve the body.

Next, the City argues that the flooding of the Bellevue morgue was unforeseeable given the unprecedented nature of Hurricane Sandy and the fact that Bellevue Hospital was not in a flood zone.

In turn, plaintiffs argue that the City should be held liable for the negligent performance of a governmental function because a special relationship existed between the City and plaintiffs. Specifically, plaintiffs argue that a special duty was formed in the following ways: [1] when the City violated PHL § 4215[1]; and [2] through plaintiffs' reliance on the City's assumption of the duty to perform mortuary services. Plaintiffs also argue that the City's provision of mortuary services is ministerial in nature. Finally, plaintiffs argue that the OCME should have foreseen the dangers posed by Hurricane Sandy and otherwise mitigated the damage to decedent's remains.

Discussion

For the reasons that follow, the City's motion must be granted. When a negligence claim is asserted against the City, the court must first determine whether the City's act was governmental or proprietary in nature. Generally, governmental functions are "undertaken for the protection and safety of the public pursuant to the general police powers (*Sebastian v. State of New York*, 93 NY2d 790, 793 [1999]) whereas the City performs a proprietary role when "its activities essentially substitute for or supplement traditionally private enterprises (*id.*). A municipality can be held liable for proprietary acts under ordinary negligence principles, however in order to establish liability for the negligent performance of a governmental function, a plaintiff must establish that the municipality owed him or her a special duty (*Applewhite v. Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). Here, plaintiffs concede that the provision of mortuary services is a governmental function. Therefore, the City can only be held liable if there was a special relationship between it and the plaintiffs (see *i.e. McLean v. City of New York*, 12 NY3d 194, 203 [2009]).

There are three ways in which plaintiffs can establish a special duty: "(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" (*McLean*, 12 N.Y.3d at 199). Plaintiffs argue that they have established a special duty under the first two categories.

A statutory duty can exist either via an express private cause of action or it may be implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the statute; and (3) the right is consistent with the legislative scheme (see *Sheehy v. Big Flats Community Day*, 73 NY2d 629, 633 [1989]). Plaintiffs' arguments that an express cause of action was created under PHL § 4215[1] and § 4201 fail. PHL § 4215 [1] concerns burial after an autopsy which does not apply here since the decedent was a claims only case. PHL § 4201 does not, by its own terms, create any express cause of action but rather generally defines the disposition of remains. Nor have plaintiffs advanced any arguments in support of an implied cause of action.

As for the second category of special relationships, a plaintiff can establish "(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] [citations omitted]). As to the first element, plaintiffs argue that City assumed an affirmative duty to act via its provision of mortuary services, that plaintiffs' funeral director's communications with the OCME are "some form of direct contact" and that plaintiffs justifiably relied upon the City's provision of mortuary services. The court rejects plaintiffs' arguments.

Here, assuming *arguendo* that the other elements exist, plaintiffs are unable to demonstrate justifiable reliance. Compare this case to *Applewhite, supra* at 431, where in that case there was a triable issue of fact as to whether a mother justifiably relied upon an EMT's assurances concerning waiting for paramedics to perform more sophisticated treatment rather than transporting a child to a nearby hospital. Here, the City's provision of mortuary services did not "lull[] the [plaintiffs] into a false sense of security and [] thereby induced [them] either to relax [their] own vigilance or to forego other available sources of protection" (*Cuffy, supra* at 261). Plaintiffs have not alleged any facts to support a claim that they reasonably relied upon the measures the OCME would take to safeguard the decedent's body at the Bellevue morgue in light of the coming storm. Accordingly, plaintiffs have failed to demonstrate a special duty and their claims must fail.

Even if plaintiffs could establish a special duty, the court finds that the City has established that the preparations the OCME made in connection with Hurricane Sandy were discretionary acts and therefore the City is entitled to the governmental function immunity defense. "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 v. City of New York*, 95 NY2d 95 [2000]). The governmental function immunity defense cannot be invoked unless the City can show that the discretionary acts were undertaken in relation to the claimed negligent conduct (*Valdez v. City of New York*, 18 NY3d 69, 72 [2011]). While plaintiffs contend that the City should have known that Hurricane Sandy, an devastating and unprecedented natural disaster, would have caused flooding in the Bellevue morgue, this argument fails as a matter of law since even if it was negligent, the City's preparations involved the exercise of reasoned judgment.

Accordingly, the City's motion for summary judgment is granted and plaintiffs' motion is denied.

In light of the court's reasoning above, the court declines to reach the parties arguments concerning whether the plaintiffs' injuries were reasonably foreseeable.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the City's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the complaint is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 2/2/17
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.