

Flynn v Town of Southampton
2017 NY Slip Op 30648(U)
March 20, 2017
Supreme Court, Suffolk County
Docket Number: 06-15028
Judge: Joseph C. Pastorella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 06-15028
 CAL. No. 16-00880OT

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 34 - SUFFOLK COUNTY

COPY**PRESENT:**

Hon. JOSEPH C. PASTORESSA
 Justice of the Supreme Court

MOTION DATE 7-27-16 (011)
 MOTION DATE 10-14-16 (012)
 ADJ. DATE 10-19-16
 Mot. Seq. # 011 - MG
 # 012 - MG;CASEDISP

-----X
 KAREN FLYNN as Administratrix of the Estate
 of ROBERT HUGH FLYNN, deceased,
 ROBERT HUGH FLYNN individually and
 KAREN FLYNN, individually,

Plaintiffs,

- against -

THE TOWN OF SOUTHAMPTON, and the
 COUNTY OF SUFFOLK,

Defendants.
 -----X

SULLIVAN PAPAIN BLOCK MCGRATH &
 CANNAVO, P.C.
 Attorney for Plaintiff
 1140 Franklin Avenue, Suite 200
 Garden City, New York 11530

DEVITT SPELLMAN BARNETT, LLP
 Attorney for Defendant Southampton
 50 Route 111
 Smithtown, New York 11787

SUFFOLK COUNTY ATTORNEY
 Attorney for Suffolk County
 P.O. Box 6100
 Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 50 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10, 32 - 48; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 29, 49 - 50; Replying Affidavits and supporting papers 30 - 31; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant The Town of Southampton for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by the defendant County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted.

Flynn v Town of Southampton
 Index No. 06-15028
 Page 2

This is an action to recover damages for wrongful death and personal injuries against the Town of Southampton and the County of Suffolk. In her complaint, the plaintiff alleges, among other things, that the defendants operated police departments and 911 emergency call systems (911 or 911 system), that the decedent Robert Hugh Flynn (Flynn) placed calls to the respective 911 systems reporting his need for aid, and that the defendants failed to come to his aid before his death and after his calls to 911.

It is undisputed that Flynn made three calls to the 911 system operated by the defendant Town of Southampton (Town) on the evening of March 8, 2005, that Flynn was inebriated at the time, and that the weather that evening was marked by very cold temperatures, severe winds, and a snow storm in progress. Flynn reported that he was underneath his motor vehicle, and that he was "freezing." However, it appears that he was unable to give his location to the 911 operators taking his calls. It is further undisputed that the Town of Southampton Police Department (SPD) undertook a search for Flynn, and called in the assistance of multiple agencies and entities. Nonetheless, Flynn was not found until hours later after he had expired due to exposure to the elements.

The Town now moves for summary judgment dismissing the complaint and all cross claims against it. 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 eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore, supra*).

In support of its motion, the Town submits the pleadings, the notice of claim filed herein, the transcripts of the depositions of two SPD employees, the plaintiff, and a nonparty witness, and an affidavit authenticating the compact disc which includes the recordings of Flynn's calls to 911. At his deposition, Robert Hintze (Hintze) testified that he was employed as a detective sergeant with the SPD from 2003 to 2011, that he was the senior police officer in charge of the investigation to locate Flynn on March 8, 2005, and that the first call from Flynn came in at 1912 hours (7:12 p.m.). He indicated that the SPD dispatch center dispatched several patrol sector units and an ambulance one minute later at 1913 hours, that an "emergent request subscriber info[rmation]" was made at that time to attempt to discover the cell phone number of the phone used by Flynn and the address related to that account, and that the Southampton Village Police Department, the Town Fire Department, and the local university police department were asked to assist in the search for Flynn at 1930 hours. He stated that, pursuant to the SPD request, AT&T provided Flynn's name and address at 1939 to 1943 hours, that police unit C41 was dispatched to the Flynn residence, and that the make and model of the motor vehicle they were attempting to locate was established.

Flynn v Town of Southampton

Index No. 06-15028

Page 3

Hintze further testified that he was already in his patrol car searching the roads when the subject information was transmitted over the police radios, that he went to the Flynn residence and spoke with the plaintiff, and that the plaintiff told him that her husband and a Brendan Patrick O'Brien were working at a construction site in Sag Harbor, New York. He stated that the plaintiff told him that she had received a telephone call from her husband at approximately 5:00 p.m. indicating that he was on his way home from work, that he spoke with O'Brien by telephone, that O'Brien indicated that he had not worked at the construction site that day, and that O'Brien provided the address in Sag Harbor where the work was being performed. He indicated that additional municipal agencies in the Sag Harbor area were called in to assist in the search for Flynn. Hintze further testified that he directed the search to expand to areas between Sag Harbor and Flynn's residence and that, when Flynn still was not found, he decided to have a second conversation with O'Brien, who revealed that, rather than going to work that day, Flynn had been at Shippy's, a local bar. He stated that he directed a patrol car to Shippy's, that the bartender there informed the responding police officer that Flynn had been picked up by a local taxi company, and that the taxi company informed his offices that the subject taxi had dropped Flynn at the Shinnecock Golf Club. He indicated that Flynn was located in the "maintenance parking lot of the Shinnecock Golf Club at approximately 2147 hours (9:47 p.m).

Hintze further testified that, in 2005, the SPD 911 system could determine the latitude and longitude of the cell phone tower which was transmitting Flynn's calls to 911, that the 911 system could not determine the latitude and longitude of Flynn's cell phone, and that the dispatchers were aware of the location of the subject cell phone tower at approximately 7:20 p.m on the evening of this incident. He stated that he was aware of the location of the cell phone tower, that the system indicated that Flynn's calls "came in on a northeast quadrant of that tower," and that he directed "our assets and resources within that ... geographic area." He indicated that Flynn was found in said parking lot which is within the northeast quadrant of the subject cell phone tower, that the parking lot is located off of Tuckahoe Road, and that the parking lot is "landscaped to preclude viewing ... into the maintenance lot."

O'Brien was deposed on March 20, 2008 and testified that he is a self-employed contractor, that he met Flynn approximately 10 to 12 years ago in a bar, and that he hired Flynn part-time to assist him in his work. He stated that he spoke to Flynn "around lunchtime" on the date of this incident, and that Flynn was having lunch at Shippy's." He indicated that the plaintiff called him sometime that evening and told him that Flynn had been in a car accident on his way home from working with him in Sag Harbor, that he told the plaintiff that Flynn had not been with him and had been at Shippy's, and that he expressed that Flynn had no reason to be in Sag Harbor that day. O'Brien further testified that "[i]t was common knowledge that [Flynn] would drive over to the guest parking lot and leave his car there and take a taxi to local bars and pubs to go drinking during the day," that Flynn had a drinking problem which was "a big issue between him and his wife," and that it was his understanding that Flynn parked in said lot to deceive his wife. He stated that he had dropped Flynn off at the Shinnecock Golf Club parking lot off Tuckahoe Road on occasion, and that he did not tell the SPD that he suspected Flynn's vehicle was parked at the golf club because the plaintiff had told him that Flynn "had been in an accident coming back from Sag Harbor and he was stuck under his car somewhere."

At her deposition, the plaintiff testified that her husband left home at 8:00 a.m. on the day in question to work with O'Brien in Sag Harbor, and that her husband called her at approximately 3:15 p.m. to tell her that he was with O'Brien and leaving work in Sag Harbor to come home. She stated that

Flynn v Town of Southampton

Index No. 06-15028

Page 4

her husband spoke with her daughter by telephone at approximately 6:00 p.m. to say he was on his way home, and that he called again at approximately 7:00 p.m. but that no one answered the phone in time to speak with him. She indicated that the police arrived at her home at 7:20 p.m., that the police informed her that her husband had been in an accident and that they were trying to locate his whereabouts, and that they asked if she knew where her husband was coming from and "if there was anywhere around me that had water." The plaintiff further testified that she told the police that, as far as she knew, her husband was coming home from a job in Sag Harbor, that a police officer used her cell phone to speak with O'Brien, and that she overheard the police officer tell O'Brien that her husband was in trouble and that O'Brien needed to tell the police where her husband was located. She indicated that O'Brien did not provide any helpful information at that time, that later in the evening a detective arrived at her home and spoke with O'Brien by telephone call a second time, and that O'Brien told the detective at that time that her husband had been at Shippy's at 4:00 p.m. She stated that her husband would often take taxi cabs from bars to the golf club because it is "around the corner" from their home, that "he liked to drink and he wouldn't drink and drive," and that when one parks there "you can't see the car, it's hidden."

James C. Cavanagh (Cavanagh) was deposed on November 24, 2014 and testified that he is employed by the SPD as a police officer, that he was involved in the search for Flynn on the day in question, and that he recalls receiving a radio transmission to the effect that he was to look for "a man under a car by a body of water." He stated that it was snowing, with heavy winds, at the time, that he searched "all over the entire area" along County Road 39, and that he eventually discovered Flynn's body in the golf club parking lot located off Tuckahoe Road. He indicated that, when he first drove into the subject parking lot, he passed Flynn's vehicle without seeing it because the visibility was so poor, that he first saw the vehicle when the wind died down as he was backing out of the parking lot, and that he noted the license plate number and confirmed with police headquarters that this was the vehicle that he had been trying to locate. Cavanagh further testified that he exited his patrol car to determine if there was anyone inside the vehicle, that he then went around the back of the vehicle, and that he found Flynn's body there. He stated that he did not recall if detective Hintze arrived shortly before or after he discovered Flynn's body, and that he checked Flynn for life signs and did not find any. He indicated that he did not recall if he ever heard a radio transmission that night informing him of the latitude and longitude of Flynn's cell phone.

A review of the recording of Flynn's cell phone calls to 911 highlights the tragic circumstances in this case. In the first call, the 911 operator asks Flynn for his address, and he is unable to answer. The 911 operator then asks Flynn for his location, and despite repeated requests the best he can do is to respond "off the highway at Shinnecock Hills." In obvious extremis, Flynn indicates that he is cold and freezing, that he is "under vehicle. I can't move," and that he was heading towards Southampton. That is, the first call failed to establish Flynn's location and led to the reasonable but erroneous belief by the SPD that Flynn was trapped under his vehicle.

In Flynn's second call, the 911 operator initially asks for the address of the emergency not knowing that the call is from Flynn, who answers "hello." The 911 operator asks if this is the caller who was in an accident, and Flynn responds "trapped." Upon being asked where he lives, Flynn responds "off County Road 39," and "golf course." In response to additional questions as to where he lives, whether he is pinned underneath his car, and where he is located, Flynn responds that he is freezing,

“please come get me,” and other non-responsive answers. By the third call, Flynn’s only responses to questions are that he is freezing, and that he is “fading out.”

As a general rule, an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person (*McLean v City of New York*, 12 NY3d 194, 878 NYS2d 238 [2009]; *Thompson v Town of Brookhaven*, 34 AD3d 448, 825 NYS2d 83 [2d Dept 2006]). The four elements that are required to establish a special relationship are (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of a 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 (see *McLean v City of New York*, *supra*; *Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20 [2005]). To sustain liability, the duty breached must be more than that owed to the public generally (*Lauer v City of New York*, 95 NY2d 95, 100, 711 NYS2d 112 [2000]). The burden of proof of establishing a special relationship is on the plaintiff (*Valdez v City of New York*, 18 NY3d 69, 936 NYS2d 587 [2011]; *Lauer v City of New York*, *supra*). In order to invoke the special duty rule, plaintiff must establish that, through affirmative acts, the municipality has lulled him or her of foregoing other avenues of protection or that it has voluntarily assumed a duty separate from that owed to the public at large (*Bishop v Bostick*, 141 AD2d 487, 529 NYS2d 116 [2d Dept 1988]). It is the plaintiff’s burden to show that the defendants’ conduct actually lulled him into a false sense of security, induced him to relax his own vigilance or forego other avenues of protection and thereby placed him in a worse position than if the defendants never assumed the duty (*Dixon v Village of Spring Valley*, 50 AD3d 943, 856 NYS2d 243 [2d Dept 2008]; see also *Dinardo v City of New York*, 13 NY3d 872, 893 NYS2d 818 [2009]; *Brown v City of New York*, 73 AD3d 1113, 902 NYS2d 594 [2d Dept 2010]; *Conde v City of New York*, 24 AD3d 595, 808 NYS2d 347 [2d Dept 2005]).

Here, the Town’s submissions indicate that Flynn was incapable of action on his own behalf, and that he was not lulled into a false sense of security or placed in a worse position had the SPD not assumed the duty to search for him. Even assuming that the first three elements of the special relationship test have been met, the fourth element requires justifiable reliance on a municipality’s undertaking. “[T]he injured party’s reliance is as critical in establishing the existence of a ‘special relationship’ as is the municipality’s voluntary affirmative undertaking of a duty to act. That element provides the essential causative link between the ‘special duty’ assumed by the municipality and the alleged injury” (*Cuffy v City of New York*, 69 NY2d 251, 261, 513 NYS2d 372, 375 [1987]; see also *Kircher v City of Jamestown*, 74 NY2d 251, 544 NYS2d 995 [1989]).

The Town has established its prima facie entitlement to summary judgment by demonstrating that a special relationship did not exist between the municipality and Flynn (see *Santoro v City of New York*, 17 AD3d 563, 795 NYS2d 60 [2d Dept 2005]). Thus, it is incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, *supra*; *Rebecchi v Whitmore*, *supra*; *O’Neill v Fishkill*, *supra*).

In opposition to the Town’s motion, the plaintiff submits, among other things, the affidavit of an expert witness, the transcripts of the previously summarized depositions of Hintze and Cavanagh, the depositions of three additional SPD employees, and a transcript of the “certified recording” of Flynn’s

Flynn v Town of Southampton
 Index No. 06-15028
 Page 6

calls to 911. A review of the three additional depositions of SPD employees submitted herein reveals that the testimony exclusively involves the actions of the respective witnesses in either handling Flynn's 911 calls or searching for his vehicle. That is, whether the respective employee was negligent in his or her handling of this matter.

The affidavit of the plaintiff's expert witness similarly only addresses the alleged negligence of the SPD herein. In his affidavit, Walter Signorelli (Signorelli) swears that he retired from the New York City Police Department as an Inspector, that he currently acts as a consultant "in security and police liability matters," and that he has reviewed the depositions and relevant documents herein. He states that, based on his review, it is his opinion that the SPD was negligent in failing to broadcast the latitude and longitude "associated with Mr. Flynn's call" at 7:20 p.m., and to search the northeast quadrant of the subject cell phone tower "in the first instance." It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see Hambsch v New York City The respondent. Auth.*, 63 NY2d 723, 480 NYS2d 195 [1984], citing *Cassano v Hagstrom*, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; *Santoni v Bertelsmann Property, Inc.*, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see Shi Pei Fang v Heng Sang Realty Corp. supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see Zuckerman v City of New York supra*; *Leggis v Gearhart*, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; *Levitt v County of Suffolk*, 145 AD2d 414, 535 NYS2d 618 [2nd Dept 1988]). Signorelli does not indicate that the initial searches were not in the northeast quadrant of the subject cell tower, or that the broadcasting of the latitude and longitude would have resulted in locating Flynn without the additional information which was developed through the SPD investigation and its second conversation with O'Brien. Here, to the extent that Mr. Signorelli's affidavit attempts to render an expert opinion, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (*see Mestric v Martinez Cleaning Co.*, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]).

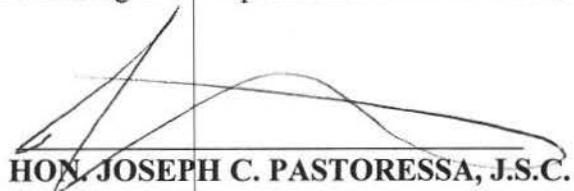
More importantly, Signorelli's affidavit does not address the issue of Flynn's justifiable reliance and the plaintiff's submissions fail to offer any admissible evidence on this issue. The record indicates that Flynn was unable to provide his location to the 911 operator and there is no evidence that the defendants made any assurances that lulled him into a false sense of security or placed him in a worse position (*see Dixon v Village of Spring Valley, supra*; *Holloway v City of New York*, 141 AD3d 688, 36 NYS3d 190 [2d Dept 2016]). Thus, the plaintiff has failed to raise a triable issue of fact.

In its answer the County of Suffolk asserts a cross claim against the Town for indemnification and/or contribution. It is well settled that the dismissal of the complaint as against the Town renders said claims or causes of action academic (*Boone v 100 Marcus Drive Assocs.*, 61 AD3d 798, 877 NYS2d 433 [2d Dept 2009]; *Zabbia v Westwood, LLC*, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]; *Hajdari v 437 Madison Ave. Fee Assocs.*, 293 AD2d 360, 740 NYS2d 328 [1st Dept 2002]). Accordingly, the Town's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Flynn v Town of Southampton
Index No. 06-15028
Page 7

The County of Suffolk (the County) now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that the County did not receive a 911 call from Flynn on the evening of this incident, and that it did not owe a duty to Flynn or the plaintiff herein. In his affirmation in partial opposition to the County's motion, counsel for the plaintiff avows that the plaintiff "can not demonstrate any 'contact' between plaintiff's decedent and the County sufficient to raise an issue of fact as to the existence of a duty on the County's part to plaintiff's decedent." The remainder of said affirmation addresses an issue regarding the notices of claim filed herein. For the reasons stated herein in determining the motions of the Town and the County, said issue is deemed academic. Accordingly, the County's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: March 20, 2017



HON. JOSEPH C. PASTORELLA, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION

To:

PHILIP J. RIZZUTO, P.C.
Attorney for Defendants Public Administrator and Strictly Suffolk, Inc.
One Old Country Road
Carle Place, New York 11514

LAW OFFICES OF THOMAS G. NOLAN
Attorney for Defendant Hometown Taxi
POLICE OFFICER Box 826
Aquebogue, New York 11931

BROWNELL PARTNERS PLLC
Attorney for Defendants NN & EM
& NN & EM LTD d/b/a SHIPPYS PUMPERNICKELS EAST
40 Wall street, 27th Floor
New York, New York 10005