

**James v City of New York**

2019 NY Slip Op 30324(U)

February 5, 2019

Supreme Court, New York County

Docket Number: 451494/2015

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART 52

Justice

-----X

INDEX NO. 451494/2015

LATOYA JAMES,

MOTION DATE 09/12/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISMISSAL

Upon the foregoing papers, defendant City of New York (City or defendant) moves for summary judgment dismissing the complaint insofar as asserted against it. For the following reasons, the motion is granted.

Plaintiff commenced the instant action seeking to recover damages for personal injuries allegedly sustained on October 23, 2014 when an errant police bullet struck her on Jamaica Avenue near Union Hall Street in Queens, New York.

In support of its motion for summary judgment, defendant submitted, inter alia, the examination before trial (EBT) transcripts of Officer Taylor Kraft, Officer Peter Rivera, and plaintiff.

Officers Kraft and Rivera testified that they, along with two other officers, were under attack by a man wielding a hatchet, who had struck one of the fellow officers, Officer Healey, in the back of the head. After attacking Officer Healey, the perpetrator

directed his attention to Officer Kraft. Officer Kraft began to fire at the perpetrator as he was backing away from him, and Officer Rivera testified to the same, and noted that Officer Kraft had turned to run away at some points as well. Officer Kraft's testimony was clear that he was only firing as he was backing away, while looking at the perpetrator. Both Officer Rivera and Officer Kraft testified that Officer Kraft had a clear and unobstructed view of the perpetrator. Officer Kraft testified that he did not have any time to look to see if there was anyone behind the perpetrator. He also testified that he initially used a two-hand grip when firing, but at some point, used one hand. Out of the eleven (11) shots he fired, he did not use his gun sights every time.

Based on where Officer Kraft was standing, when he fired toward the perpetrator, he was firing in the direction of Union Hall, towards the west, and possibly a bit north (which would be toward Jamaica Avenue). This was the same direction where plaintiff happened to be walking. After hearing the police officer's gun shots, plaintiff sought to take cover. She almost made it between two parked cars when she was struck by one of Officer Kraft's bullets.

In addition to the EBT testimony, defendant also submitted the final discharge report, which concluded, after an investigation, that both officers "utilized tactics that were both reasonable and appropriate," noting that Officer Kraft attempted to retreat and did not have time to seek cover, and that the officers' firing of the weapons were within NYPD guidelines.

"[E]ven if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely

raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority” (Valdez v City of New York, 18 NY3d 69, 76 [2011]). The governmental function immunity defense, or “[t]he professional judgment rule[,] insulates a municipality from liability for its employees’ performance of their duties ‘where the . . . conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions” (Johnson v City of New York, 15 NY3d 676, 680 [2010], quoting McCormack v City of New York, 80 NY2d 808, 811 [1992] [internal quotations omitted]). “This immunity, however, presupposes that judgment and discretion are exercised in compliance with the municipality’s procedures, because ‘the very basis for the value judgment supporting immunity and denying individual recovery becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion’” (Johnson v City of New York, 15 NY3d at 681, quoting Haddock v City of New York, 75 NY2d 478, 485 [1990]).

The Court finds that the defendant met its initial prima facie burden entitling it to summary judgment as a matter of law. The evidence submitted in support of the motion demonstrates the extreme, instantaneous, and life-threatening sequence of events, requiring quick, tactical decision-making and exercise of discretion. Additionally, the evidence that the police department found that the officers did not violate any internal rules or protocols, demonstrates that the officers were acting in the exercise of professional judgment and are entitled to immunity under the circumstances.

In opposition, plaintiff failed to raise an issue of fact as to whether a police guideline was violated, i.e., whether the discharge of Officer Kraft's weapon "unnecessarily endanger[ed] innocent persons." Although pedestrians were present, this fact does not necessarily mean that the guideline was violated. "Rather, the guideline grants officers the discretion to make a judgment call as to when, and under what circumstances, it is necessary to discharge their weapons" (Johnson v City of New York, 15 NY3d 676, 681 [2010]). Here, contrary to plaintiff's contentions, there is no evidence that the area was more crowded than usual (see Rivera EBT at 150 [noting the opposite because it was raining]). There is no evidence that anyone was in the officers' line of sight between them and the perpetrator; indeed, there is no evidence that anyone was in the immediate vicinity of the officers and the perpetrator when they started shooting. Further, contrary to plaintiff's contentions, any alleged inconsistencies in the officers' testimonies are not material and, upon a reading of the testimonies as a whole, do not warrant the denial of summary judgment.

It is important to keep in mind that the rule providing immunity in this case "reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury" (Haddock v City of New York, 75 NY2d 478, 484 [1990]). It "afford[s] a full defense for discretionary acts, even when all elements of the negligence claim have been established" (Valdez, 18 NY3d at 78). Unfortunately for plaintiff, who was attempting to

take cover approximately fifteen feet away in the background, this is one of those instances that outweigh imposing liability for her injury.

The remainder of defendants' motion was unopposed and is therefore granted. Defendant New York City Police Department is dismissed as a non-suable entity under Section 396 of the New York City Charter (see, e.g., Funt v Human Resources Admin. of the City of N.Y., 68 AD3d 490 [1st Dept 2009]). The claim for negligent hiring, training and retention is dismissed as the officers were concededly acting within the scope of their employment (see Karoon v N.Y. City Transit Auth., 241 AD2d 323 [1st Dept 1997]). Plaintiff's complaint fails to plead a federal Monell 42 USC § 1983 claim, as it fails to allege a custom or policy by the City to deprive her of her constitutional rights; there is no evidence of a widespread practice as opposed to circumstances specific to plaintiff's own incident (see De Lourdes Torres v Jones, 26 NY3d 742, 768-69 [2016]; Leung v City of New York, 216 AD2d 10, 11 [1st Dept 1995]).

This constitutes the decision and order of the Court.



2/5/2019  
DATE

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ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

**HON. ALEXANDER M. TISCH**  
 OTHER  
 REFERENCE

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN