

Presinal v City of New York

2019 NY Slip Op 31747(U)

June 12, 2019

Supreme Court, New York County

Docket Number: 157038/2016

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

INDEX NO. 157038/2016
MOTION DATE 06/05/2019
MOTION SEQ. NO. 002

DOMINGO PRESINAL,
Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT, JOHNSJANE DOE, MITCHELL BERNSTEIN

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of a motor vehicle accident that occurred on October 25, 2015, at the intersection of First Avenue and 34th Street, in the City, County, and State of New York. Specifically, plaintiff alleges that he was operating his motor vehicle at or near the aforementioned location and he was involved in a collision with a motor vehicle operated by defendant, Mitchell Bernstein ("Bernstein"). Plaintiff alleges that the collision was caused by the carelessness, recklessness and negligence of defendant, the City of New York and/or the New York Police Department("City").¹

The City moves to dismiss the complaint in its entirety pursuant to CPLR §3211 and CPLR §3212. Plaintiff opposes the instant motion. Notably, the motion is unopposed by defendant Bernstein. For the reasons set forth below, the City's motion is granted.²

¹ There appears to be no dispute that the New York City Police Department is not subject to suit. Thus, that portion of the City's motion is granted without opposition.

² The Court does not address the defendant's motion to dismiss the complaint pursuant to CPLR § 3211. A previous motion by plaintiff to amend his pleadings was denied, and that decision is on appeal. As a result, the Court's focus will be whether summary judgment is an appropriate remedy in this case.

TESTIMONY

Plaintiff's testimony is unclear regarding the color of the traffic light at the corner of First Avenue; however, the pleadings allege he was directed to go through the red light by a traffic agent. Plaintiff testified that other than waving him forward, the traffic agent did not communicate with him. Plaintiff further testified that once he entered the intersection his vehicle was struck by Bernstein's vehicle. Plaintiff did not see Bernstein's vehicle prior to the collision.

DISCUSSION

In support of its motion, the City relies solely on plaintiff's testimony to establish its entitlement to summary judgment. The City contends that based on plaintiff's testimony alone, the traffic agent was engaged in a discretionary governmental function and no special duty was owed to the plaintiff.

In opposition, plaintiff alleges that the motion is premature because the traffic agent has yet to be deposed and as such, the City has failed to establish that the traffic agent was exercising discretion.

In a negligence claim asserted against a municipality, the court must decide if the municipal actions fall into a proprietary service or governmental function (*see Wittorf v City of New York*, 23 NY3d 473, 478 [2014]). Where the actions fall into discretionary governmental functions, there is no basis for liability (*see Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428 [2011]; *McLean v City of New York*, 12 NY3d 194 [2009]; *Dinardo v City of New York*, 13 NY3d 872 [2009]; *Lauer v City of New York*, 95 NY2d 95 [2000]; *Tango v Tulevech*, 61 NY2d 34 [1983]).

It is well settled that traffic control by police officers constitutes a discretionary governmental function (*see Wittorf*, 23 NY3d 473; *Alvarez v Beltran*, 121 AD3d 488 [1st Dept

2014]; *Casale v City of New York*, 117 AD3d 414 [1st Dept 2014]; *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011]; *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]).

Here, it is undisputed that a traffic agent was engaged in traffic control at the subject intersection. Thus, engaged in a discretionary governmental function which cannot be the basis for municipal liability.

A municipal employee acting negligently while in the performance of a discretionary governmental function does not create an exception to the preclusion of liability (*Alvarez v Beltran*, 121 AD3d 488 citing *Valdez v City of New York*, 18 NY3d 69, 75 -76 [2011]). “[A]ny negligence on the part of the officer” committed in the course of a discretionary function grants the City immunity from suit (*Shands v Escalona*, 44 AD3d 524 [1st Dept 2007]).

Moreover, there is no special duty here that provides a basis to impose liability. A special duty may arise in three scenarios: (1) a statute exists for the benefit of plaintiff; (2) the municipality voluntarily assumed a duty greater than that which is owed to the public at large; or (3) where the municipality takes positive control over a known dangerous condition (*see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013], *Albino v New York City Hous. Auth.*, 78 A.D.3d 485, 488 [1st Dept 2011]).

If a municipality engaged in a governmental function, under the public duty rule, the municipality owes a general duty to the public at large but is not subject to claims of negligence by an injured person unless the facts demonstrate that a special duty was created between the injured plaintiff and the governmental entity. *See Valdez*, 18 NY3d at 75. “Without a [special] duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.” *Lauer v City of New York*, 95 NY2d 95, 100 [2000].

In this instance, even assuming the traffic light was red once plaintiff was waved forward, it is not objectively reasonable that the plaintiff would have become less vigilant when driving through an intersection. Further, nothing in plaintiff's testimony establishes that a special duty was created by the traffic agent.

For the foregoing reasons, moving defendants have prima facie shown that plaintiff cannot satisfy the threshold requirement to suit which has not been overcome by the plaintiff.

Accordingly, it is hereby

ORDERED that defendant CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT's motion for summary judgment is granted and the complaint is dismissed as to these entities only; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

6/12/2019
DATE


LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**HON. LYLE E. FRANK
J.S.C.**