# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JULIO RODRIGUEZ, III** **PART** **IAS MOTION 62EFM**

***Justice***

----------X

ELTON ELMOND EMMANUEL HOSTEN,

Plaintiff,

- v -

FIRST KID INC.,NURUL HAQUE, SAMANTHA CAROLL, DEBRINA MUNOZ, THE NEW YORK CITY POLICE DEPARTMENT, THE CITY OF NEW YORK

Defendant.

----------X

**INDEX NO.** 450328/2018

**MOTION DATE** 06/20/2019, 06/20/2019

**MOTION SEQ. NO.** 002 003

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 134, 135, 141, 142, 144, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion to/for LEAVE TO FILE.

Plaintiff Hosten commenced this action seeking damages arising out of a car accident at the intersection of 34th Street and Park Avenue, Manhattan, on February 22, 2016. Plaintiff Hosten was a passenger in his own vehicle, driven by defendant Samantha Carroll ("Carroll"), said vehicle travelling westbound on 34th Street at the time of the accident. Defendant Carroll was waved into the intersection by defendant Debrina Munoz ("Munoz"), a traffic control agent employed by defendant New York City Police Department ("NYPD"), an agency of defendant City of New York ("City"). While proceeding into the intersection, the Hosten-Carroll vehicle and a taxi driven by defendant Nurul Haque ("Haque") were involved in a collision; the taxi was owned by defendant First Kid Inc. ("First Kid"). The taxi was traveling southbound on Park Avenue through the intersection.

This decision addresses motion sequences two and three.[1]

Motion sequence two is defendants City, NYPD, and traffic agent Munoz's (collectively "City defendants") motion to dismiss pursuant to CPLR 3211 (a) (7) and for summary judgment pursuant to CPLR 3212 to ultimately dismiss the complaint in its entirety as against them. All other parties oppose this motion.

[1] The docket for this matter suffers from a degree of disorder apparently related to the change of venue from Supreme Court, Kings County. In this decision, the specific NYSCEF Document Numbers ("Doc. Nos.") are referenced where necessary to avoid further disorder.

On motion sequence two, plaintiff cross-moves for summary judgment on liability as plaintiff was an innocent passenger in one of the vehicles. City defendants and defendants First Kid and Haque oppose plaintiff's cross-motion.

Motion sequence three is plaintiff's order to show cause for leave to serve a late notice of claim and an amended summons and complaint. City defendants oppose this application.

The first issue addressed will be that branch of plaintiff's motion sequence three that requests leave to serve its amended summons and complaint. Second, the court addresses the substance of City defendants' motion to dismiss and for summary judgment on motion sequence two. Third, the court takes up the issue of plaintiff's application for leave to serve a late notice of claim on motion sequence three. Lastly, the court addresses plaintiff's motion for summary judgment—his cross-motion on sequence two.

Status of the Complaint – Plaintiff's OSC to Amend

Upon the agreement of all parties at oral argument before this court on June 20, 2019, plaintiff's order to show cause for leave to serve a late notice of claim and amended summons and complaint will be considered as a renewal of plaintiff's original order to show cause filed in Kings County prior to this matter's transfer. Plaintiff's original order to show cause in Kings County (NYSCEF Doc. No. 27) was not decided prior to transfer of venue, which occurred by order of Hon. Reginald A. Boddie dated February 9, 2018 (City aff. in supp., Ex J, NYSCEF Doc. No. 123). Although this motion was never addressed, the docket makes apparent that the parties have treated—for years (*see e.g.* City motion to change venue dated June 19, 2017, NYSCEF Doc. No. 31)—plaintiff's proposed amended summons and complaint as plaintiff's effective pleading. To the extent necessary, and in order to address the substance of the parties' contentions, the court hereby grants plaintiff's motion to amend the summons and complaint (City aff. in supp., Ex A, NYSCEF Doc. No. 114),[2] deems said pleading served, and notes City defendants' appearances in

[2] The court notes that plaintiff, in his order to show cause for leave to serve a late notice of claim and an amended summons and complaint, refers to the proposed amended summons and complaint as an annexed exhibit (plaintiff aff. in supp., NYSCEF Doc. No. 172, at ¶ 33 ["As a matter of completeness, annexed as Exhibit 'L' is a copy of the proposed amended summons and verified complaint, adding Debrina Munoz, the New York City Police Department and the City of New York to this caption"]); however, plaintiff's exhibits ascend only to Exhibit "J" (deposition transcript of defendant Munoz), and the court can find no amended summons and complaint filed as an exhibit to this motion. Notwithstanding the foregoing, it is apparent from the docket that all parties are treating the "Amended Verified Complaint" dated May 16, 2017, attached to City defendants' motion for summary judgment as Exhibit "A" (NYSCEF Doc. No. 114), as the operative pleading.

Additionally, plaintiff filed a pleading (NYSCEF Doc. No. 25) identical to City's Exhibit "A" (NYSCEF Doc. No. 114) on May 19, 2017, in Supreme Court, Kings County, as Exhibit "L" to its original order to show cause, and none of the parties allege confusion as to said complaint governing here.

Another curiosity that should not go unmentioned is plaintiff's attachment of a bill of particulars from *Roy Dave Davis and Anscherley Noel v. Sorin Dancu and Joseph S. Dancu* as Exhibit "A" to the instant order to show cause in place of his original complaint (*see* NYSCEF Doc No. 173). Plaintiff's application, then, has neither his original nor proposed amended complaint annexed.

Because the parties' intentions are clear, however, this court, equally, has no complaint.

this action by means of their Answer to Amended Complaint (City aff. in supp., Ex F, NYSCEF Doc. No. 119) and Amended Answer to Amended Complaint (City aff. in supp., Ex K, NYSCEF Doc. No. 124).

Facts and Deposition Testimony

As described by plaintiff Hosten at his deposition (City aff. in supp., Ex N), on February 22, 2016, at 11:00 a.m., he was being driven by defendant Carroll as a passenger in his own car (*id.* at 36-37). The accident occurred at the intersection of 34th Street and Park Avenue (*id.* at 36); plaintiff's vehicle was traveling westbound on 34th Street (*id.*, at 38). At 34th Street and Park Avenue, defendant Carroll proceeded into the intersection at the direction of the stationed traffic agent, who was blowing a whistle and waving (*id.* at 59-60). The traffic control agent was also gesturing to the Park Avenue southbound drivers to remain stopped even though they had a green light (*id.* at 67-68). Defendant Carroll proceeded into the southbound side of the intersection (*id.* at 68). The taxi came from the right (driving southbound on Park Avenue) and the accident occurred between the two vehicles (*id.* at 73-75). Some part of the front of plaintiff Hosten's vehicle struck some part of the left side of the taxi (*id.* at 77-78).

Defendant Carroll testified (Carroll aff. in opp., Ex B) that on February 22, 2016, at approximately 11:00 a.m., defendant Carroll was driving a four-door sedan westbound on 34th Street (*id.* at 12-13, 18). Plaintiff Hosten owned the vehicle and was a passenger in the vehicle (*id.* at 8, 13). As she approached the traffic signal for Park Avenue, the traffic signal turned yellow and then red (*id.* at 23). Defendant Carroll stopped at the traffic signal (*id.* at 24). After one or two seconds, defendant Carroll was directed by defendant traffic agent Munoz to proceed through the intersection (*id.* at 31, 41-42). Ms. Munoz was blowing a whistle and waved defendant Carroll through (*id.*). Defendant Carroll entered the intersection against a red light (*id.*). On 34th Street crossing Park Avenue, defendant Carroll proceeded through the northbound lanes of Park Avenue entirely and about halfway through the southbound lanes of Park Avenue when her vehicle was struck by a taxi operated by defendant Haque (*id.* at 53). Defendant Carroll stated that she observed defendant Haque's taxi stopped at the Park Avenue traffic signal before she was waved through and proceeded into the intersection (*id.* at 29-30).

As described by defendant Munoz at her deposition (City aff. in supp., Ex O), on February 22, 2016, at approximately 11:00 a.m., she was working as a traffic control agent for NYPD directing traffic at the intersection of 34th Street and Park Avenue (*id.* at 7-12). Traffic conditions were heavy for the westbound lanes of 34th Street, so she was ordered by a supervisor to "pull the cars through" (*id.* at 18-22). Ms. Munoz directed the southbound traffic on Park Avenue to remain stopped as she directed defendant Carroll's vehicle through the intersection westbound on 34th Street (*id.* at 26-29). Ms. Munoz had her left hand in a pause position toward the Park Avenue southbound drivers including defendant Haque's taxi (*id.* at 58-59). Ms. Munoz directed defendant Carroll's vehicle through the intersection by waving her right hand and blowing her whistle "consistently" (*id.* at 59). As she initially made these gestures, the light for Park Avenue southbound drivers was red (*id.* at 59); it then changed to green for those drivers, and Ms. Munoz continued her gestures (*id.* at 59-60, 63). As Ms. Munoz directed the vehicle behind defendant Carroll to stop, defendant Carroll's vehicle proceeded through the intersection, and defendant

Haque's taxi proceeded as well (*id.* at 30-31). Ms. Munoz did not see the impact (*id.* at 30). Ms. Munoz believes defendant Haque's taxi had a green light on Park Avenue southbound when he proceeded forward (*id.* at 65).

Defendant Haque testified (plaintiff aff. in supp. of cross-motion, Ex C) that he was driving the taxi at issue on February 22, 2016 (*id.* at 11). Immediately before the accident occurred around 11:00 a.m., he was driving southbound on Park Avenue, having turned onto Park Avenue from 38th Street (*id.* at 12-15). Defendant Haque stopped at a red light at 34th Street (*id.* at 18). He did not observe any traffic control agents in the intersection of 34th Street and Park Avenue (*id.* at 23). The light turned green, and defendant Haque proceeded into the intersection (*id.* at 23-25). A car proceeding westbound on 34th Street struck his taxi in the general front left area of his vehicle (*id.*).

Parties' Positions

City defendants argue that they are entitled to summary judgment because 1) plaintiff failed to plead that he was owed a special duty, 2) plaintiff was not owed a special duty, 3) City defendants are immune from liability when performing traffic control, a discretionary governmental function, 4) plaintiff's negligent hiring, retention, and assignment claim is not stated in the proposed notice of claim, 5) defendant Munoz was acting in the scope of her employment so the negligent hiring, retention, and assignment claim cannot stand, 6) plaintiff has not served a notice of claim (and the pending late notice of claim application should be denied), and 7) plaintiff failed to seek leave of court to amend his complaint to add City defendants as parties. In support of their motion, City defendants attach copies of the pleadings, plaintiff's bill of particulars, a transfer order dated February 9, 2018, the proposed notice of claim, plaintiff's affirmation in support of an order to show cause for leave to serve a late notice of claim and amend the complaint, the transcript of plaintiff Hosten's deposition, the transcript of defendant Munoz's deposition, a decision dated December 14, 2017, in *Jagatpal v Chamble, et al.* (Index No. 161749/2015), and a joint trial order dated December 14, 2016.

Defendant Carroll opposes City defendants' motion, contending that City defendants' motion must be denied because 1) City defendants did not seek leave of court to serve their amended answer, which added defendant Munoz as a represented party, and 2) the testimony of City defendants' witnesses creates a question of fact on liability. Defendant Carroll also argues that if City defendants' motion is granted as to the plaintiff, defendant Carroll's cross-claims for common law contribution and indemnification must be severed and converted to third-party claims. In opposition, defendant Carroll attaches the deposition transcripts of Officer Edward Guzik and defendant Carroll.

Plaintiff also opposes the motion because, he argues, 1) that branch of City defendants' motion which seeks dismissal for failure to state a claim does not meet the applicable standard for dismissal, 2) plaintiff's claim alleges liability based upon a ministerial governmental act because defendant Munoz testified that she usually has a second traffic agent with her at the intersection at issue, 3) City defendants' have not met their *prima facie* burden *vis-à-vis* special duty, and 4) plaintiff will have fulfilled the notice of claim requirement if its pending application to serve a late

notice of claim is granted (which, plaintiff argues, should be granted).

Defendants First Kid and Haque oppose the motion, contending that defendant Munoz undertook a special duty by directing defendant Carroll's vehicle into the intersection. Defendants First Kid and Haque argue that defendant Munoz undertook such a duty by waving the subject vehicle through the intersection, that such waving was "direct contact", and that defendant Carroll "justifiably relied" on the waving. Additionally, defendants First Kid and Haque argue that City defendants' motion should be denied because 1) the failure to place two traffic control agents was ministerial (and not discretionary) and 2) summary judgment is rarely appropriate in negligence actions.

In addition, plaintiff cross-moves for summary judgment in his favor on the issue of liability as against all defendants. Plaintiff argues that he, as an innocent passenger in one of the vehicles involved in the accident, is entitled to summary judgment on the issue of liability. In support of his cross-motion, plaintiff attaches an affidavit from plaintiff, the deposition transcript of defendant Carroll, the deposition transcript of defendant Haque, the deposition transcript defendant Munoz, the pleadings, plaintiff's bill of particulars, and a transfer order dated February 9, 2018.

City defendants oppose plaintiff's cross-motion for the same reasons set forth in their motion for summary judgment dismissing the complaint as against them.

Defendants First Kid and Haque oppose plaintiff's cross-motion because a jury could conclude that defendant Haque is free from liability and, they contend, summary judgment is rarely appropriate in a negligence action.

Status of City Defendants' Answer

As an initial matter, defendant Carroll objects to that branch of City defendants' motion which requests summary judgment on behalf of defendant Munoz on the basis that City defendants served an amended answer without leave of court (Carroll aff. in opp. at ¶¶ 3-7). It was in the amended answer that defendant Munoz was as a represented party (*id.*).

City defendants' amended answer was served on November 8, 2018 (City aff. in supp., Ex K), and City defendants moved for summary judgment on December 14, 2018 (City aff. in supp.). This court finds that defendant Carroll's failure to object to City defendants' amended answer for more than one month after its service "constituted a waiver of any claim that the answer was not timely served" (*Phillips v League for Hard of Hearing*, 254 AD2d 181 [1st Dept 1998] citing *Wittlin v Schapiro's Wine Co.*, 178 AD2d 160 [1st Dept 1991] ["retention of an answer without objection will be deemed a waiver of objection as to untimeliness"]). Defendant Carroll failed to object to City defendants' amended answer before and until City defendants moved for summary judgment more than one month after the amended answer's service. Consequently, the court finds that defendant Carroll's objection to City defendants' motion on the foregoing basis is without merit.

Having addressed the parties' procedural arguments regarding the status of pleadings in this matter,[3] the court will now address the parties' substantive arguments on motion sequences two—City defendants' motion to dismiss and for summary judgment as well as plaintiff's cross-motion for summary judgment—and three—plaintiff's order to show cause for leave to serve a late notice of claim.

Applicable Law – Dismissal and Summary Judgment Standards

"[O]n a CPLR 3211 motion to dismiss we 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (*Leon v. Martinez,* 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994])" (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501 [1st Dept 2018]). However, "factual allegations...that consist of bare legal conclusions...are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266 [1st Dept 2006]).

"[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018] citing *Leon*). "[T]he criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" and the court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013] citing *Leon*). The court may also "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015] citing *Leon*).

The proponent of a motion for summary judgment must tender sufficient evidence to show its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, "the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

Applicable Law – Municipal Liability

Traffic control is a traditional governmental function (*Jagatpal v Chamble*, 172 AD3d 573, 574 [1st Dept 2019] citing *Balsam v Delma Eng'g Corp.*, 90 NY2d 966 [1997]; *cf. Wittorf v City*

[3] Note that plaintiff's order to show cause was granted *supra* (at 2-3) to the extent that plaintiff requested leave to serve the amended complaint; the parties' conduct indicates that said complaint was already being treated as plaintiff's operative pleading (*id.*).

*of New York*, 23 NY3d 473, 480 [2014]) and not subject to the "proprietary" prong of governmental liability analysis (*see Connolly v Long Island Power Authority*, 30 NY3d 719, 727 [2018]).

Therefore, the rule here, as to potential municipal liability, "is that '[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general'" (*Valdez v City of New York*, 18 NY3d 69, 76 [2011] quoting *McLean v City of New York*, 12 NY3d 194, 203 [2009]). Stated differently, "[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. By contrast, ministerial acts—meaning conduct requiring adherence to a governing rule, with a compulsory result—may subject the municipal employer to liability for negligence" when combined with a special duty (*Lauer v City of New York*, 95 NYD2d 95, 99 [2000]; *see Connolly v Long Island Power Authority*, 30 NYd3 719, 728 [2018]).

"Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach" (*Valdez v City of New York*, 18 NY3d 69, 76 [2011] quoting *Mon v City of New York*, 78 NY2d 309, 313 [1991]).

Traffic control is a discretionary governmental function for which municipalities "cannot be held liable" (*Casale v City of New York*, 117 AD3d 414, 415 [1st Dept 2014]; *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011]; *see Jagatpal v Chamble*, 172 AD3d 573 [1st Dept 2019] ["The municipal defendants cannot be held liable for plaintiff's injuries, even if the traffic officers were negligent, because the officers were involved in the discretionary governmental function of traffic control"]; *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]).

"[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" (*Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709 [2017] quoting *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]). In this case, the parties dispute the second type of special relationship, namely, whether City defendants "voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally" (*id.*).

The Court of Appeals articulated the four elements of the second type of special relationship in *Tara N.P.* (28 NY3d at 714): "(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" (*id.*, quoting *Cuffy v. City of New York*, 69 NY2d 255 [1987]). "[A]ll four elements must be present for a special duty to attach" (*Tara* citing *Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013]). Additionally, "the direct contact requirement has not been applied in an overly rigid manner" (*Tara*, 28 NY3d 709, quoting *Cuffy*, 69 NY2d 255).

Discussion and Application – City Defendants' Motion to Dismiss and for Summary Judgment

City defendants contend that plaintiff failed to plead a special duty in his amended summons and complaint and that, therefore, the complaint must be dismissed (City aff. in supp. at ¶¶ 14-21; *see Puello v City of New York*, 118 AD3d 492 [1st Dept 2014]). In *Puello*, the First Department held that a plaintiff must "allege or provide the factual predicate for the special relationship theory in his notice of claim and complaint" (*id.* citing *Blackstock v Board of Educ. of the City of N.Y.*, 84 AD3d 524 [1st Dept 2011]). Here, plaintiff's most detailed allegation describing the conduct of defendant Munoz is that she "performed her duties, directing traffic [on February 22, 2016, at the intersection of 34th Street and Park Avenue] in a negligent manner, which resulted in the happening of this accident" (City aff. in supp., Ex A, NYSCEF Doc. No. 114 at ¶ 26; *see* NYSCEF Doc. No. 25 at ¶ 26). Because plaintiff makes no specific factual allegations that touch upon the elements of a special relationship, this court finds that plaintiff's complaint is deficient insofar it fails to allege the "factual predicate" for a special duty (*see Jagatpal v Chamble*, 172 AD3d 573, 574 [1st Dept 2019] [Dismissal appropriate where "plaintiff failed to plead...that there was a special relationship owed to him"]). City defendants' motion to dismiss based on plaintiff's failure to plead a special duty is therefore granted on this basis.

For the sake of thoroughness, however, this court will also analyze City defendants' arguments on summary judgment. Here, the court finds that defendant Munoz's waving to defendant Carroll does not satisfy the element of "direct contact" (*see Dinardo v City of New York*, 13 NY3d 872, 874 [2009]; *Ewadi v City of New York*, 117 AD3d 439, 440 [1st Dept 2014]) as part of an analysis of whether a special duty is owed to "plaintiff beyond what was owed to the public generally" (*Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709 [2017]). Accordingly, this court finds that "the record establishes that plaintiff cannot prove all the of the necessary elements" of a special duty (*Puello v City of New York*, 118 AD3d 492 [1st Dept 2014] citing *Valdez v City of New York*, 18 NY3d 69, 80-81 [2011]).

Moreover, the court finds that the decision to place one or two traffic control agents at the intersection was an exercise of discretion in the use of municipal resources (City aff. in supp., Ex O at 41-48; Carroll aff. in opp., Ex A at 19; *see Wittorf v City of New York*, 23 NY3d 473, 480-481 [2014] citing *Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997] ["tort suits that test the course of action undertaken by the police in furtherance of public safety are disfavored under our law because they implicate choices about the allocation of finite police resources"]; *In re World Trade Center Bombing Litigation*, 17 NY3d 428, 452 [2011]).

The court further finds that defendant Munoz exercised discretion in traffic control by waving defendant Carroll's vehicle through the intersection (City aff. in supp., Ex O at 18-22, 80-85; *see Casale v City of New York*, 117 AD3d 414, 415 [1st Dept 2014]; *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011]; *see also Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]). Consequently, defendant City of New York cannot be held liable for defendant Munoz's acts whether or not a special duty existed (*McLean v City of New York*, 12 NY3d 194, 203 [2009] ["Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the

public in general"]). As in *Jagatpal v Chamble*, 172 AD3d 573, 574 (1st Dept 2019), "[t]he municipal defendants cannot be held liable for plaintiff's injuries, even if the traffic officers were negligent, because the officers were involved in the discretionary governmental function of traffic control".

Finally, as regards plaintiff's claims for negligent hiring, retention, and assignment:

> "Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention (*Eifert v. Bush,* 27 AD2d 950, *affd.* 22 NY2d 681). This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training." (*Karoon v New York City Transit Authority*, 241 AD2d 323, 324 [1st Dept 1997]).[4]

Because plaintiff alleges (City aff. in supp., Ex A, NYSCEF Doc. No. 114 at ¶ 24; NYSCEF Doc. No. 25 at ¶ 24) and this court finds that defendant Munoz was acting in the scope of her employment (City aff. in supp., Ex O at 7-8, 12, 20-21), "no claim may proceed against the employer for negligent hiring or retention" (*Karoon* at 324). Moreover, to the extent that plaintiff claims that defendant City of New York was negligent in assigning only one traffic agent to this intersection or in assigning defendant Munoz specifically, the court finds that such assignment was discretionary and may not provide a basis for liability here (City aff. in supp., Ex O at 18-22, 41-48, 80-85; *McLean v City of New York*, 12 NY3d 194, 203 [2009]).[5] Therefore, the court finds that plaintiff's claims for negligent hiring, retention, and assignment must also be dismissed as a matter of law.

Consequently, the court finds that defendants City of New York, New York City Police Department, and Debrina Munoz made a *prima facie* showing of their entitlement to summary judgment, and the court further finds that plaintiff, defendant First Kid, defendant Nurul Haque, and defendant Samantha Carroll have failed to raise a question of fact in opposition to the motion.

---

[4] "While an exception exists to this general principle where the injured plaintiff is seeking punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee (*Bevilacqua v. City of Niagara Falls,* 66 A.D.2d 988, 989, 411 N.Y.S.2d 779; *Mastrodonato v. Chili,* 39 A.D.2d 824, 825, 333 N.Y.S.2d 89), that exception is inapposite here. The Court of Appeals has clearly held that the State and its political subdivisions, as well as public benefit corporations such as the instant Transit Authority defendants, are not subject to punitive damages (*Sharapata v. Town of Islip,* 56 N.Y.2d 332, 452 N.Y.S.2d 347, 437 N.E.2d 1104; *Clark–Fitzpatrick, Inc. v. Long Island Rail Road,* 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190)" (*Karoon* at 324).

[5] Additionally, to the extent the opposing parties argue that defendant City's motion should be denied because defendant Munoz's testimony describes, in one instance, a "usual procedure" (City aff. in supp., Ex O at 41) that sounds in 'ministeriality' (*compare id.* at 42 ["Sometimes [there are two agents placed at the intersection]. It depends. Sometimes it's twice a week, sometimes it's once a week, sometimes I have a partner every day"] and 43 ["If they have agents to backfill on that post, they will backfill them there. But if not, I'm by myself"]), plaintiff failed to plead, and there is no evidence to create a question of fact on, the elements of a special relationship (*supra* at 7-8; *see McLean v City of New York*, 12 NY3d 194, 203 [2009]).

For the foregoing reasons, defendant Carroll's cross-claims against City defendants must also be dismissed.

Accordingly, City defendants' motion to dismiss for failure to state a claim and for summary judgment dismissing the complaint and all cross-claims should be granted in its entirety.

Motion Sequence Three – Plaintiff's OSC for Leave to Serve a Late Notice of Claim

In accordance with the foregoing, that branch of plaintiff's order to show cause for leave to serve a late notice of claim is hereby denied 1) as moot and 2) because plaintiff's complaint lacks merit (*Catherine G. v County of Essex*, 3 NY3d 175 [2004]).

Motion Sequence Two – Plaintiff's Cross-Motion for Summary Judgment

Plaintiff cross-moves for summary judgment on the basis that he was an innocent passenger in one of the vehicles involved in the accident at issue. "'[T]he right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence' among defendants" (*Petty v Dumont*, 77 AD3d 466 [1st Dept 2010] quoting *Johnson v Phillips*, 261 AD2d 269, 272 [1st Dept 1999]). The court finds that plaintiff has made his *prima facie* showing that he was a non-negligent, innocent passenger in the vehicle proceeding on 34th Street (plaintiff's aff. in supp. of cross-motion, Ex B, at 8, 50-51) and that such showing was unrebutted by the opposing parties.

However, the cases cited by plaintiff in support of total summary judgement on liability all involve factual scenarios where there was evidence of negligence in the record. For example, in *Petty v Dumont*, 77 AD3d 466 (1st Dept 2010), there was evidence that the driver was driving erratically and too fast, and the municipal defendants' witness testified that the arrangement of the barriers into which the driver collided was a "hazard" (*id.* at 467-468). Additionally, in *Johnson v Phillips*, 261 AD2d 269 (1st Dept 1999), the collision at issue was a rear-end accident with a stopped vehicle, which "establishes a *prima facie* case of negligence" (*Matos v Sanchez*, 147 AD3d 585, 586 [1st Dept 2017]).

Accordingly, the court finds that plaintiff failed to make a *prima facie* showing of negligence as to defendants: defendant Carroll proceeded through the intersection at the direction of defendant traffic agent Munoz (plaintiff's aff. in supp. of cross-motion, Ex B, at 41-42), and defendant First Kid's taxi, operated by defendant Haque, proceeded into the intersection under a green light (plaintiff's aff. in supp. of cross-motion, Ex C, at 23).

Moreover, in light of the disposition of City defendants' motion, a jury could reasonably find that neither defendant Carroll nor defendant Haque's negligence, if any, was the proximate cause of the accident. In fact, a jury might find that defendant Munoz's conduct caused the accident and that no recovery lies here. Although such a result, if it arises, may seem unjust under the circumstances, the doctrine of governmental immunity

> "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]; *see Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 716 [2017]).

Plaintiff's cross-motion for summary judgment on liability is therefore granted only to the extent of a finding of non-negligence as to plaintiff Hosten, and the motion is otherwise denied.

Accordingly, and upon the parties' respective papers and exhibits, it is ORDERED that that branch of plaintiff's application by order to show cause which sought to amend the complaint is hereby granted, and the amended complaint is deemed served upon the defendants herein including defendants City of New York, New York City Police Department, and Debrina Munoz; and it is further

ORDERED that plaintiff's application by order to show cause is otherwise denied, including that branch of plaintiff's application by order to show cause that sought leave to serve a late notice of claim; and it is further

ORDERED that defendants City of New York, New York Police Department, and Debrina Munoz's motion to dismiss and for summary judgment is hereby granted, and the complaint and all cross-claims are severed and dismissed as to defendants City of New York, New York Police Department, and Debrina Munoz; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is hereby granted only to the extent of a finding that plaintiff Hosten was not negligent; and the cross-motion is otherwise denied; and it is further

ORDERED that defendants City of New York, New York City Police Department, and Debrina Munoz are to serve a copy of this order with notice of entry upon all parties and the General Clerk's Office within twenty days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this matter be referred to a non-City part.

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

July 22, 2019

HON. JULIO RODRIGUEZ III, JSC

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | [ ] | CASE DISPOSED | | [X] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [ ] DENIED | [X] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [X] | INCLUDES TRANSFER/REASSIGN | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |