

Wharwood v City of New York
2019 NY Slip Op 32950(U)
October 7, 2019
Supreme Court, New York County
Docket Number: 156004/15
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARVIN WHARWOOD,

Plaintiff,

-against-

CITY OF NEW YORK and PROJECT RENEWAL
INC.,

Defendants.
-----X

CAROL R. EDMEAD, J.S.C.:

Index No. 156004/15
Motion Seq. No. 004

DECISION AND ORDER

In this negligence action involving an attack outside of a homeless shelter, defendants City of New York (the City) and Project Renewal Inc. (Project Renewal) (together, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing all claims against them. Plaintiff Marvin Wharwood (Plaintiff or Wharwood) opposes the motion.

BACKGROUND

On Saint Patrick’s Day, 2014, Plaintiff, a resident of Project Renewal was attacked by another resident on the sidewalk abutting the homeless facility. More specifically, nonparty Dante Smith (Smith) struck Plaintiff with the cap to a fire hydrant, causing Plaintiff injuries.

On the day of the attack, Plaintiff testified that he had an encounter with Smith prior to the attack on the sidewalk outside the shelter. Specifically, Plaintiff testified that Smith told him, “I’m feeling to kill somebody” (NYSCEF doc No. 100 at 27). Plaintiff attempted to calm Smith, but then Smith remained agitated, began speaking close to his face, and Plaintiff told him to back away, as Smith was projecting saliva onto Plaintiff’s face as he spoke (*id.* at 29). Then, Plaintiff alleges, that Smith pushed Plaintiff, Plaintiff objected and Smith threatened to punch him (*id.* at 30). Then, according to Plaintiff, the two men began to wrestle with each other, but another man

managed to break up the scuffle (*id.* at 31-32). Smith went inside Project Renewal's building for five minutes, according to Plaintiff, then came out, grabbed the fire hydrant cap, approached Plaintiff and hit him on the left side of the head (*id.* at 33-34).

Plaintiff filed his complaint on June 15, 2015. It alleges five causes of action: the first cause of action is for negligence against the City for failing to remove a loose fire hydrant cap on the sidewalk; the second cause of action alleges that the City was negligent for referring Smith to Project Renewal and that Project was negligent for providing insufficient security to protect Plaintiff from Smith; the third cause of action alleges that Project Renewal was negligent in failing to provide Plaintiff with a safe and secure living space; the fourth cause of action alleges that the City was negligent in failing to provide adequate security to Plaintiff; and the fifth cause of action alleges that Defendants are liable to Plaintiff for having violated unnamed provisions of administrative codes of the state and the city of New York.

Plaintiff's verified bill of particulars alleges that the City was liable in negligence for: failing to remove the fire hydrant cap, referring Smith to Project Renewal, and failing to provide reasonable security; it alleges that Project Renewal is liable in negligence for: failing to remove the fire hydrant cap or notify the City of its presence, and failing to use reasonable care in protecting Plaintiff from the attack by Smith (NYSCEF doc No. 79). The bill of particulars makes no allegations relating to the fifth cause of action, which alleges that Defendants violated unnamed statutory provisions. Nor does Plaintiff allege, in opposition to this motion, that Defendants have violated any specific statutory provisions. In these circumstances, the Court must dismiss the fifth cause of action as abandoned (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]).

In this motion, Project Renewal and the City argue that they are entitled to summary judgment as Defendants had no duty to Plaintiff. With respect to the claims relating the fire hydrant, the City additionally argues that it had no written notice of the alleged defect.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Negligence Allegations Related to the Fire Hydrant Cap

The City

With respect to the claim that the City was negligent with respect to a dangerous condition created by the fire hydrant cap, the City argues that it did not have written notice pursuant to New York City Administrative Code (the Administrative Code) § 7-201 (c) (2), which provides:

"No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within

fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.”

Defendants submit an affidavit from Chris Dickerson (Dickerson), an insurance claim specialist, who conducted a search for any written complaints about the subject cap (NYSCEF doc No. 76). Dickerson states that “the New York City Fire Department has not advised us of the existence of any written notice for a removed or missing fire cap for a fire hydrant on the sidewalk adjacent to 651 West 168th, New York, New York at least 15 days prior to plaintiff’s alleged accident (*id.*, ¶ 2).

Plaintiff, in opposition, does not challenge fact that the City did not have written notice pursuant to § 7-201 (c) (2) of the Administrative Code. Instead, Plaintiff argues that the fire hydrant cap does not fall within the ambit of this provision. However, the statute covers sidewalks, as well as “encumbrances thereon or attachments thereto.” As the cap clearly falls within this language, and the ambit of statute, Plaintiff’s negligence claims against the City relating to the fire hydrant cap must be dismissed.

Project Renewal

Project Renewal argues that it had no duty to Plaintiff regarding to the fire hydrant cap.

To establish negligence, a plaintiff is required to prove: “the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury” (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia*, *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

Defendants argue, among other things, that Project Renewal had no duty to Plaintiff, as the use of the cap as a weapon was unforeseeable. Plaintiff cites, in opposition, to Project Renewal’s office manager, Awilda Morton (Morton), who testified that Sera Security, Project

Renewal's security contractor, inspects the sidewalk area outside the facility (Morton tr at 43-48). Morton testified that if Sera Security saw anything on the sidewalk outside of the facility that could be used to hurt a resident, it would be removed or reported" (*id.* at 48).

The Court agrees with Defendants that the use of the fire hydrant cap as a weapon was unforeseeable. Thus, Project Renewal did not have any duty to remove the cap, and the branch of Defendants' motion seeking dismissal of Plaintiff's claim that Project Renewal was negligent for failing to do so must be granted.

II. Negligence Allegations Related to Security

Hospitals and care facilities, such as Project Renewal, have a duty "to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety" (*Morris v Lenox Hill Hosp.*, 232 AD2d 184, 185 [1st Dept 1996] [internal quotation marks and citation omitted]). Here, both Project Renewal and the City provided security for the facility. Morton, Project Renewal's office manager, testified that both Sera Security and Department of Homeless Services provide security (NYSCEF doc No. 101 at 43).

Here, Defendants note that they are not Plaintiff's insurer, citing to *Killeen v State* (66 NY2d 850 [1985]). In *Killeen v State*, the Court of Appeals held that while "[t]he state owes patients in its institutions a duty of reasonable care to protect them from injury, whatever the source," this obligation does "not render the state an insurer or require it to keep each patient under constant surveillance" (*id.* at 851).

Defendants argue that, as the attack arose quickly, it was not foreseeable and they did not, therefore, have a duty to intervene. Plaintiff argues that the attack was foreseeable, as Smith had demonstrated a belligerent attitude "all morning." Moreover, Plaintiff alleges that, after his initial

scuffle with Plaintiff, Smith had an altercation of some kind with security inside the shelter. However, Plaintiff does not submit any admissible evidence supporting the proposition that such an altercation took place.

Plaintiff cites *Storelli v McConner St. Holdings, LLC* (2018 NY Slip Op 33110 [U] [Sup Ct, NY 2018]), where this Court held that employees at a McDonald's had a duty to call the police or intervene when they witnessed an assault that later continued on the sidewalk outside the restaurant. However, here, unlike *Storelli*, there is no evidence that DHS or Project Renewal employees or agents had witnessed an assault, or actions suggesting that an assault was imminent or likely. Thus, the duty to act was not triggered here. Accordingly, Plaintiff's negligence claims premised on the failure to provide adequate security must be dismissed.

III. Negligence Allegations Related to the City's Referral of Smith to Project Renewal

Plaintiff's allegations under this claim are conclusory. Plaintiff submit the City's policy with regard to referral of homeless individual's to homeless shelters. Moreover, Plaintiff fails to show how, in referring Smith to Project Renewal, the City violated those policies or violated a duty to other residents at the shelter, such as Plaintiff. Accordingly, the branch of Defendant's motion seeking dismissal of Plaintiff's claim that the City is liable for a negligent referral must be granted.

CONCLUSION

Accordingly, it is

ORDERED that the branch of Defendants' motion seeking summary judgment dismissing all claims against defendant Project Renewal Inc. is granted; and it is further

ORDERED that the branch of Defendants' motion seeking summary judgment dismissing all claims against defendant City of New York is granted; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly; and it is further

ORDERED that counsel for Defendants is to serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: October 7, 2019

ENTER:



Hon. CAROL R. EDMÉAD, JSC

**HON. CAROL R. EDMÉAD
J.S.C.**