

<b>Lomtevas v City of New York</b>
2019 NY Slip Op 33145(U)
October 15, 2019
Supreme Court, New York County
Docket Number: 450869/2018
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: TRANSIT PART: 21

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**Vera A. Lomtevas**, individually and as the  
Administrator of the Estate of D Lomtevas,

Plaintiff,

-against-

The City Of New York City,  
The Port Authority of New York and New Jersey,  
New York City Transit Authority,

Defendants.

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DECISION AND ORDER

Index No. 450869/2018

Mot. Seq. 1

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:*

Papers	Numbered	NYCEF #
Port Authority's Motion/ Affirmations/Memo of Law	<u>1</u>	5-13
Plaintiff's Affidavit in Opposition	<u>2</u>	14
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LISA A. SOKOLOFF, J.

In this action based on negligence and wrongful death, Plaintiff Vera A. Lomtevas, a *pro se* litigant acting individually and as the Administrator of the estate of D. Lomtevas (DL), seeks to hold Defendants the Port Authority of New York and New Jersey ("Port Authority"), the City of New York (the "City" and its mayoral agency, the New York Police Department ["NYPD"]) and the New York City Transit Authority (NYCTA) (Port Authority, City and NYCTA, collectively, Defendants) liable for the death of her deceased son, DL, because Defendants did not prevent DL from jumping to his death from the George Washington Bridge (GWB).

Port Authority moves to dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a lawful negligence or wrongful death claim against Port Authority. The City opposes Port Authority's motion as premature.

According to the complaint, on October 5, 2016, at about 4:00 a.m., DL, a college student, placed clothing under his blanket to give the appearance he was still in bed, left his house in Bensonhurst, Brooklyn, took an Uber to a subway station, boarded a D train and traveled to Manhattan. Before leaving his house, DL posted a suicide note to Reddit.com. Shortly after DL left home, his sister, EL, woke and discovered his absence. At 4:13 am, EL began texting him asking where he was and demanding that he return home. She then alerted DL's parents that DL was no longer home.

At 5:19 am, DL's sister contacted the New York City Police Department ("NYPD") via a call to 911 to report DL missing. The operator told EL that they could do nothing beside filing a missing person report until EL knew DL's precise whereabouts. E further told NYPD authorities that D was suffering from severe depression and suicidal thoughts and had previously attempted suicide on the Verrazano Narrows Bridge a few weeks earlier, in August 2016.

At her mother's suggestion, EL was able to locate DL's cell phone through the Apple "Find My iPhone" feature and thereafter tracked his movements. EL learned that DL was at the Macombs Dam Park near Yankee Stadium moving toward the Macombs Bridge. At 5:42 am, EL called NYPD authorities again through 911 to report that DL was near the Macombs Dam Park and requested that the NYPD go to the park immediately as DL was in a suicidal state. The 911 operator told EL that police were dispatched to DL's cross-streets that E gave the 911 operator. However, because D's location kept changing,

the operator told EL that officers would immediately report to the family residence to verify DL's location.

At 6:00 am, several NYPD police officers from the 68<sup>th</sup> Precinct arrived at the Lomtevas family residence in Brooklyn, New York. One of the officers who identified himself as "Joe" watched the Find My iPhone application track DL's whereabouts in real-time. This information was relayed by "Joe" to his fellow NYPD officers. The NYPD officers who arrived at the Lomtevas home were informed by family members that DL had previously attempted suicide on August 22, 2016 at the Verrazano Narrows Bridge and that the incident resulted in the NYPD having to rescue him from the engineering walkway of the bridge.

Based on the GPS tracking of the Find My iPhone application, DL moved north quickly as if on a subway train to Kingsbridge. Officer "Joe" commented to his fellow officers that it appeared that DL was traveling through the Bronx. Meanwhile, EL was on the phone again with a 911 operator describing in real time DL's exact location and movements.

Subsequently, DL's location changed more rapidly as if he was on a train heading in a straight line toward Manhattan, allegedly on the D subway line rapidly heading southbound. At approximately 6:15 am, the application indicated that DL had moved to 145<sup>th</sup> street on the subway train and remained there for approximately twenty minutes.

One of the six NYPD officers outside the Lomtevas residence called D's cellphone at approximately 6:47 am. DL answered the call and kept the line open for about six minutes. According to the complaint, DL apparently told the NYPD police officer that he would return in an hour to the R train station at the intersection of 4 Avenue and 86<sup>th</sup> Street

in southern Brooklyn. After DL hung up the phone, the NYPD officer attempted to call DL again, but DL refused to answer. The police officer entered the Lomtevas residence and announced that DL was coming home.

At approximately 6:55 am., the application showed that DL took the A train from 145<sup>th</sup> Street to 175<sup>th</sup>. He then proceeded north on foot to the south-side pedestrian walkway of the George Washington Bridge where the phone application indicated DL was located just over the Fort Washington Park. The NYPD officers in the Lomtevas home made no attempt to alert Port Authority police department ("PAPD") officials or patrol of DL's location or that he was suicidal and needed to be rescued from the bridge.

According to PAPD Lieutenant Daniel McCabe, Shield #192, noone alerted Port Authority police that there was an active jumper approaching the bridge. Instead, Lieutenant McCabe said that members on that morning's shift 'overheard' NYPD radio traffic describing DL as he headed to the bridge. Lieutenant McCabe said they had twenty minutes of lead time to respond to DL's approach. According to Lieutenant McCabe, PAPD officers who were in their police car on their patrol spotted DL on the bridge's southern walkway. According to PAPD accounts, a Port Authority police officer stopped in the far lane of opposing traffic and ran across the roadway to the southern pedestrian walkway. The Port Authority officer apparently grabbed DL, who had climbed over the guardrail, and as Lieutenant McCabe asserted to DL's parents, "nearly went over the guardrail with DL."

DL's body was recovered from the water shortly after the fall, unconscious and exhibiting no vital signs. Ambulances had apparently been waiting for him and arrived at the emergency room at 7:38 am., but DL was pronounced dead 57 minutes after his arrival at the hospital.

Plaintiff seeks to hold the Port Authority liable for the death of DL, advancing two theories of liability. First, because the Port Authority owns and operates the George Washington Bridge and was aware that it regularly draws suicidal individuals seeking to jump from it, the GWB is a dangerous instrumentality and Port Authority failed to exercise reasonable care and take necessary action to ensure its safety. Plaintiff cites to statistics that someone jumps from the GWB every 3.5 days. By failing to adequately erect barriers and fencing on the pedestrian walkways and to engage in other reasonable courses of conduct to prevent jumpers from the GWB, the Port Authority knowingly operated an inherently dangerous instrumentality that resulted in the death of DL.

Second, Plaintiff claims that the complaint established conduct by the government that created a special relationship with Plaintiff and thereby gave rise to a special duty which Defendants breached by failing to take reasonable acts to rescue DL.

Port Authority opposes, claiming that Plaintiff has failed to meet its burden of proving a special relationship and therefore liability may not be imposed on an agency, which, in its operation of the GWB, is performing a governmental function.

The Port Authority is a bi-state agency created by compact in 1921 between the States of New York and New Jersey with the consent of the Congress of the United States to construct and operate transportation facilities in the bi-state region, including the GWB (1921 NY Laws, Ch. 154; 1921 NJ Laws, Ch. 151; 42 Stat., 174, NY Unconsol. Laws §§ 6401, 6407, 6501, et seq. (McKinney 2000) (*Faillace v Port Authority of New York and New Jersey*, 130 AD2d 34 [1st Dept 1987])). From this grant of authority, and pursuant to the Federal Bridge Act of 1906, the Port Authority constructed and operates the GWB. The Port Authority performs a governmental function in undertaking the construction,

maintenance and operation of the GWB (McKinney's Cons Laws of NY §6515; *Whalen v Wagner*, 4 NY2d 575 [1958]).

It is fundamental that to recover in a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care, and that it breached that duty (*Turcotte v Fell*, 68 NY2d 432 [1986]). When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [1st Dept 2013]). If a municipality's actions are considered proprietary, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties (*Id.* at 425). A government entity performs a purely proprietary role when its "activities essentially substitute for or supplement traditionally private enterprises" (*Id.* at 425, quoting *Sebastian v State of New York*, 93 NY2d 790, 793 [1999] [internal quotation marks omitted]).

In contrast, acts "undertaken for the protection and safety of the public pursuant to the general police powers" are governmental in nature (*Id.* at 425, quoting *Sebastian v State of New York*, 93 NY2d 790, 793 [1999]). It is undisputed that this case involves the provision of police protection, which is a classic governmental, rather than proprietary, function (*Valdez v City of New York*, 18 NY3d 69 [2011]). A municipality cannot be held liable for negligence in the performance of a governmental function, unless it owed a "special duty" to the injured party; "the duty breached must be more than that owed the public generally" (*Applewhite*, 21 NY3d at 426).

The rationale underlying the government-function doctrine rests on several critical concerns: that the costs of tort recoveries would be excessively burdensome for taxpayers; the threat of liability could dissuade municipalities from maintaining emergency medical

and ambulance services; and extensive exposure to liability could consequently render municipal governments less, not more, effective in protecting their citizens (Id. at 430)

A special duty, in contrast to a general duty owed to the public, arises from a special relationship between the plaintiff and the governmental entity (*McLean v City of New York*, 12 NY3d 194 [2009]). To establish a special relationship, a plaintiff is required to show: (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 " (*Applewhite*, 21 NY3d at 430-431, quoting *Cuffy v City of New York*, 69 NY2d 255 [1987]).

Here, Defendant Port Authority argues that the Complaint does not establish that it owed a special duty to DL because Plaintiff has not pleaded any facts that establish that actions taken by the Port Authority resulted in a justifiable reliance by DL prior to his decision to end his life. Rather, the Complaint alleges that DL had already decided to jump off the bridge, and nearly took a PAPD police officer over the bridge railing with him, as the officer grabbed hold of DL.

Defendant maintains that its maintenance and operation of the GWB, as well as measures taken to prevent injury by individuals attempting to jump from the bridge, falls within Port Authority's police powers and is a purely governmental function (*LeBeau Piping Corp. v City of New York*, 170 Misc 644 [Sup Ct, NY Co 1938]; *Whelan v Wagner*, 4 NY2d 575 [1958]) and cites a number of cases where a municipal entity, alleged to have negligently failed in the provision of security, was held to be performing a governmental function.

Plaintiff counters that a special relationship was formed by virtue of NYPD officers present at DL's family home, tracking DL's whereabouts in real time, having been informed of DL's prior suicide attempt Verrazano Narrows Bridge, being told that they do not need his photograph, that they can ping his phone, that they spoke to him, and the officer announcing to the family that DL was coming home. DL's family, Plaintiff argues, justifiably relied on the NYPD's affirmative undertaking and representations that it would rescue and safely bring DL home. As a result, DL's family relaxed their vigilance and/or abandoned other avenues of possible protection for DL, placing DL and his family in a worse position than they would have been had the NYPD never assumed the duty to rescue him and ensure his safety.

There was insufficient evidence to establish that the city had undertaken a special relationship in *Valdez v City of New York*, 18 NY3d 69 [2011], where the plaintiff notified police at her local precinct that she had obtained a second order of protection against her former boyfriend and police later called her to confirm that the boyfriend had been served with the court order. When the former boyfriend threatened to kill her, Valdez called the police, who told her to return to her apartment and the boyfriend would be arrested immediately. The court found that it would not have been reasonable for Valdez to have relied on the police promise to arrest the boyfriend "immediately" in a literal sense since his location had to be discovered. Here, unlike in *Valdez*, there was no promise or affirmative statement made by Port Authority that could have formed the basis of a special relationship.

In *Applewhite*, EMTs were dispatched to plaintiff's home after plaintiff's daughter went into an anaphylactic shock. Noting that EMT's treatment was limited to CPR, the plaintiff asked EMT to take her daughter to a hospital a few minutes from her house. One

EMT continued CPR and allegedly indicated that he was awaiting the arrival of an advanced life support ambulance. The plaintiff's brought action against the city, alleging that the EMTs were negligent in failing to bring oxygen, delaying transportation to the hospital, and delaying their call for the ALS ambulance. The court found that a question of fact was raised as to whether the EMT, through their actions or promises, assumed an affirmative duty in deciding to have ALS paramedics undertake more sophisticated medical treatment rather than transporting the child to a hospital. Here, as alleged in the complaint, the only affirmative action taken by Port Authority was moments before DL leapt to his death.

Although it is arguable that the actions of the NYPD officers who came to the Lomtevas residence, tracked DL's whereabouts, spoke to DL on the phone and advised the family that DL was returning home establish a special relationship, Plaintiff has provided no evidence that the relationship extended to the Port Authority. Indeed, the complaint alleges that "according to PAPD Lieutenant Daniel McCabe, Shield #192, nobody alerted Port Authority police that there was an active jumper approaching the bridge." Instead, PAPD personnel 'overheard' NYPD radio traffic describing DL as he headed to the bridge, when they spotted him and intervened. Tragically, the brief interaction with PAPD officers was insufficient to thwart DL's determination to take his own life, much less, establish the existence of a special relationship. Nor has the Plaintiff alleged any facts that suggest there was an assumption by Port Authority personnel of a voluntary duty to DL beyond that owed to the general public (*Ewadi v City of New York*, 117 AD3d 439 [1st Dept 2014]). Because the record is devoid of facts that would establish a special relationship between Port Authority and DL, Port Authority may not be held liable for its maintenance and operation of the GWB.

With respect to Plaintiff's wrongful death cause of action premised on the claim that GWB is a dangerous instrumentality, the court finds Port Authority's arguments persuasive. "A dangerous instrumentality is something which, in its normal operation, is an implement of destruction, or an agency, such as electricity, gas or explosives, the use of which involves grave danger" (*Goslin v La Mora*, 137 AD2d 941 [3rd Dept 1988]). Thus, items that are perfectly harmless in their normal operation are not dangerous instrumentalities (*Pietrangolare v Catalioto*, 255 AD2d 221 (1st Dept 1998) (holding that a kitchen chair that fell on the plaintiff's foot was not a dangerous instrumentality). Moreover, when a thing is not dangerous when used normally, but can cause injury if used improperly, the owner has no duty to take special precautions to protect a user from obvious danger (*Cotroneo v Sabatino*, 50 AD2d 1081 (4th Dept 1975), *aff'd* on other grounds, 41 NY2d 848 [1977]). Furthermore, "[a] tortfeasor may only be held liable for the suicide of a person that is the result of the tortfeasor's negligent conduct, provided the suicide is a foreseeable consequence of the tortfeasor's acts" (*Watkins v Labiak*, 282 AD2d 601, 602 [2d Dept 2001]).

Port Authority cites to California and Massachusetts state court cases that considered the liability of a bridge owner for an individual who jumps from the bridge to his or her death (*Milligan v Golden Gate Bridge Highway and Transp. Dist.*, 120 Cal. App. 4<sup>th</sup> 1, 4 (2004); *Nelson v Massachusetts Port Auth.*, 55 Mass App Ct. 433 [2002]) and this court agrees with the reasoning of the cited cases. In *Milligan*, where the plaintiff's daughter jumped over the three-and-one-half-foot safety railing on the Golden Gate Bridge, the plaintiff claimed the lack of a suicide barrier was a dangerous condition. The California court found that the bridge owner could not be held liable for the lack of a suicide barrier as a matter of law and that it was not a dangerous condition because "[b]y

definition, persons who use the bridge to commit suicide are not using the bridge in a manner used by the general public exercising ordinary care" (*Milligan*, at 7).

The plaintiff in *Nelson*, also alleged the negligent failure to institute adequate safeguards, but the Massachusetts court concluded that the bridge owner "owed the decedent the same duty owed to all those lawfully on the bridge: a duty to use reasonable care to maintain its property in a reasonably safe condition" "which would be safe to a person who exercises such minimum care as the circumstances reasonably indicate" (*Nelson*, at 436) (internal citations omitted). In opposition, Plaintiff cites only to cases where the municipality negligently operated and/or maintained property resulting in injury to a member of the public exercising ordinary care, a different standard to the one applicable here (*Ireland v Oswego, Hannibal & Sterling Plank Rd. Co.*, 13 NY 526, 531-532 [1856] (failure to warn that road leads to dangerous precipice); *Hutson v Mayor of City of N.Y.*, 9 NY 1638 [1853] [failure to keep public streets in repair]; *Nelson v Village of Canisteo*, 100 NY 89 [1885] [failure to remedy obstruction in street]; *Turner v City of Newburgh*, 109 NY 301 [1888] [failure to cure defective street condition]; *Wager v State of New York*, 7 NY2d 945 [1960] [failure to install traffic sign indicating curve]; *Henriquez v Parsippany Constr. Co., Inc.*, 62 AD3d 749 [2d Dept 2009] [failure to repaint faded road stripes]; *Friedman v State of New York*, 67 NY2d 271 [1986] [failure to install highway median barriers, a known dangerous condition for highway drivers]).

In contrast to the instant case, the cases relied upon by Plaintiff are those where the public entity owed a duty to the plaintiff to maintain the public property in a reasonably safe condition when used as intended. None of Plaintiff's cases involve the existence of a special duty owed to the plaintiff beyond the general duty owed to the public. In the

absence of a showing that Plaintiff was owed a special duty, the negligence cause of action is not legally sustainable.

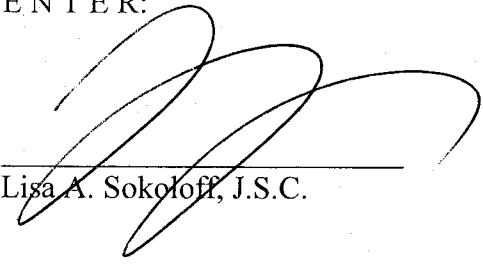
Accordingly, it is ORDERED, that the Port Authority's motion for summary judgment is granted and Plaintiff's complaint and all cross-claims are dismissed as against the Port Authority; and it is further

ORDERED, that Plaintiff's claims against the remaining defendants are severed and shall continue.

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

Dated: October 15, 2019  
New York, New York

ENTER:

  
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Lisa A. Sokoloff, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
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