

Coleman v City of New York

2020 NY Slip Op 31059(U)

April 24, 2020

Supreme Court, New York County

Docket Number: 151877/2016

Judge: Laurence L. Love

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART 62

Justice

-----X

MARVIN COLEMAN,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES,
VOLUNTEERS OF AMERICA- GREATER NEW YORK,
INC.

Defendant.

-----X

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and a large text box containing 'DECISION + ORDER ON MOTION'.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 54, 56, 58, 61, 62, 64, 66, 68, 70, 72, 74, 75, 76, 77, 83

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 57, 59, 60, 63, 65, 67, 69, 71, 73, 78, 79, 80, 81, 82

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motions are decided as follows:

Plaintiff commenced the instant action seeking to recover for injuries allegedly sustained in an incident which occurred on December 22, 2014. On said date, plaintiff was a resident of a homeless shelter located at 1 Keener Building, Wards Island, located in New York County, where he was violently assaulted by another resident who is not named in the instant action. Plaintiff served his Notice of Claim upon the City on or about March 17, 2015 and on or about February 5, 2016, Plaintiff appeared for a hearing pursuant to General Municipal Law 50-h. Plaintiff commenced the instant action on or about March 3, 2016, by filing a Summons and Verified Complaint alleging negligence by the City of New York as the owner of the shelter, the New York City Department of Homeless Services as the provider of security at the shelter and Volunteers of

America - Great New York, Inc's ("VOA") as the operator of the shelter. Issue was joined by service of the City's Answer on March 29, 2016 and service of VOA's Answer on March 9, 2016. Defendants now each move for summary judgment, dismissing the instant action.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against. (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of the motions, the movants submit plaintiff's deposition and 50-h transcript, the management agreement between DHS and VOA, the relevant incident and police reports, and the depositions of VOA and the City, which establish as follows: Prior to the incident that occurred on December 22, 2014, plaintiff made approximately six (6) verbal complaints to staff members that an unknown resident kept skipping Plaintiff in line in the "mess hall." Additionally, Plaintiff alleged that the unknown resident threatened to "crack his head." Plaintiff further testified that DHS officers said they would take care of it. On the date of incident, Plaintiff stated that no DHS officers or security guards were present on the floor that morning, nor did he interact with any

DHS officers prior to the incident occurring. Prior to the relevant assault, Plaintiff and the unknown resident had never been involved in a physical altercation with each other.

As discussed in *Beato v. Cosmopolitan Assocs., LLC*, 69 A.D.3d 774 (2nd Dept. 2010), “A landlord is not the insurer of the safety of its tenants. Nevertheless, “[l]andlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person.” Third-party criminal conduct is considered foreseeable as a matter of law where it is ‘reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.’ ‘Without evidentiary proof of notice of prior criminal activity, the owner’s duty reasonably to protect those using the premises from such activity never arises. The question of the scope of an alleged tort-feasor’s duty is, in the first instance, a legal issue for the court to resolve.’ ‘Whether the prior criminal activity occurring within the subject premises provides sufficient evidence “to establish that it is reasonably foreseeable that the tenants are at risk of harm depends on a variety of factors, including ‘the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question. (internal citations omitted)”

Here, plaintiff alleges that his assailant had cut in front of him in the food line and had threatened him on several occasions. Plaintiff further alleges that he complained to DHS approximately six times, but did not notify VOA on any occasion. Further, none of these threats were similar in nature to the assault at issue. As such, the assault was not foreseeable and does not give rise to a duty on behalf of VOA. Further, DHS and not VOA was responsible for security at the shelter and as such, did not have the power to prevent the subject assault. As such, VOA has established a *prima facie* entitlement to summary judgment.

In opposition, plaintiff argues that the threats reported to DHS raise an issue of fact as to whether the subject assault was foreseeable and further argues that VOA should have been on notice of those threats based upon its daily meetings with DHS. Even if VOA had been on notice of the threats, plaintiff's assailant had not engaged in any violence sufficient to establish a prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location. As such, plaintiff fails to raise a triable issue of fact precluding summary judgment.

Defendants, the City of New York and the New York City Department of Homeless services seek dismissal of the instant action pursuant to CPLR R. 3211(a)(7) for plaintiff's failure to plead that he was owed a special duty, or in the alternative summary judgment as plaintiff was not owed a special duty. A defendant cannot be liable for a plaintiff's injuries unless it owes a duty of care running directly to the injured person. See, e.g., *Valdez v. City of New York*, 18 N.Y.3d at 75; *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 584 (1994). Under the public duty rule, liability for the performance of governmental functions cannot attach unless plaintiff both pleads and establishes a special duty. *Valdez v. City of New York*, 18 N.Y.3d 69 (2011); see also *McGinness v. City of New York*, 113 A.D.3d 566 (1st Dep't 2014); *Freeman v. City of New York*, 111 A.D.3d 780 (2d Dep't 2013). As discussed in *Alava v. City of New York*, 54 A.D.3d 565 (1st Dept. 2008), A municipal defendant is immune from liability for negligence claims arising from the performance of its governmental functions unless the injured party can establish the existence of a special duty (see *Mastroianni v. County of Suffolk*, 91 NY2d 198 [1997]; *Kircher v. City of Jamestown*, 74 NY2d 251 [1989]). A special duty can be created in three ways: (1) through the breach of a statutory duty for the benefit of a particular class of persons, provided that the governing statute authorizes a private right of

action or one can be fairly implied; (2) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation; and, (3) when the municipality voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty. See, *Pelaez v. Seide*, 2 N.Y.3d 186 (2004); The elements of a duty based on the third situation are: “(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” (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). Here, plaintiff has failed to plead that plaintiff was owed a special duty by the municipal defendants and even if plaintiff has done so, plaintiff would be unable to establish that plaintiff was owed a special duty by any of the municipal defendants. As such, the municipal defendants are entitled to dismissal of the instant action.

In opposition, Plaintiff contends that 1) the City is not entitled to the defense of governmental immunity because its functions at the Keener facility were proprietary in nature; and 2) the City owed the Plaintiff a special duty. Contrary to plaintiff's argument, As discussed in *Clark v. City of New York*, 130 A.D.3d 964 (2nd Dept. 2015), plaintiff's theory of recovery is premised upon the alleged failure of the municipal defendants to provide an adequate and proper security force to prevent attacks by third parties at the homeless shelter where the subject incident occurred. Such a claim, however, implicates a governmental function, liability for the performance of which is barred absent the breach of a special duty owed to the injured party (*see Stora v City of New York*, 117 AD3d 557, 558 [2014]; *Salone v Town of Hempstead*, 91 AD3d 746, 747 [2012]; *Akinwande v City of New York*, 260 AD2d 586, 586 [1999]). As such, plaintiff is required to both

plead and establish a special relationship. To assume a special duty, the "promise" must (1) be specific, (2) must create a reasonable basis for justifiable reliance; and (3) the assumption of duty alleged must take on a responsibility above and beyond the parameters of the ordinary work of the governmental actor. See *Ewadi v. City of New York*, 117 A.D.3d 439 (1st Dep't 2014). DHS's statements that they would "take care of it" are insufficiently specific to constitute a promise as defined here, See, *Bawa v. City*, 94 A.D.3d 926 (2d Dep't 2012); *Silver v. City of New York*, 281 A.D.2d 233 (1st Dep't 2001). Additionally, to establish reliance, a plaintiff must show justified relaxation of vigilance, a lull into a false sense of security, and relinquishment of other avenues of protection based on the governmental actor's representations, See, *Valdez*, 18 N.Y.3d 69; *Dinardo v. City of New York*, 13 N.Y.3d 872 (2009). Further, plaintiff has failed to establish knowledge that inaction could lead to harm. As plaintiff cannot establish three of the four elements necessary to establish a special relationship, plaintiff's action must be dismissed.

ORDERED that both of defendants' motions for summary judgment are granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

4/24/2020

DATE



LAURENCE L. LOVE, J.S.C.

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