

Reid v City of New York
2020 NY Slip Op 31485(U)
May 20, 2020
Supreme Court, New York County
Docket Number: 160007/2017
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 52

Justice

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LAWRECE REID,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, OFFICE OF THE CHIEF MEDICAL
EXAMINER OF THE CITY OF NEW YORK, LISA ROSSI

Defendant.

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INDEX NO. 160007/2017
MOTION DATE N/A, N/A
MOTION SEQ. NO. 001 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for JUDGMENT - SUMMARY

In this action plaintiff alleges loss of sepulcher and negligence. Plaintiff alleges that defendants failed to take reasonable and diligent efforts to locate the decedent's next of kin, and seeks damages for injuries sustained.

Defendants, (collectively "the City"), now move for dismissal and summary judgment primarily on the grounds that plaintiff has failed to plead and establish a special duty. Plaintiff opposes the instant motion on the grounds that notification of death to a next of kin is a ministerial action, thus the City's attempt to apply special duty is misplaced and the City may be held liable for negligence in its failure to perform the ministerial action. Based on the reasons set forth below, the Court finds that the actions taken by the City of New York under these circumstances was in fact discretionary, warranting the application of the special duty analysis. As such, the matter is dismissed for failure to plead special duty.

Facts

Yvonne Walford, the decedent and plaintiff's mother, was homeless and was often seen by plaintiff near the Bryant Park area. On February 17, 2017, decedent was found, taken to Bellevue Hospital and died there later that day. Decedent did not have any identification on her and was processed as a 'Jane Doe'. On February 18, 2017, the Office of the Chief Medical Examiner (OCME) took possession of the decedent. The following day on, February 19, 2017, an autopsy was conducted and fingerprints were taken of the decedent; at that point she was identified as Yvonne Walford.

While it is unclear from the record what actions were taken to locate Ms. Walford's next of kin from February 19, 2017 up until April 24, 2017, the date the case was assigned to an investigator to locate the next of kin, it is clear that such an undertaking was necessary.

Sometime in March 2017, plaintiff contacted the New York City Police Department (NYPD), via telephone, regarding her mother. It is undisputed that plaintiff expressed concern over not seeing her mother in Bryant Park, where she would usually see her. Plaintiff was informed by an NYPD officer that a missing persons report could not be filed over the telephone and that plaintiff would have to physically visit the precinct to make such a report. Plaintiff never filed a missing persons report.

In April 2017, the investigator assigned to locate Ms. Walford's next of kin searched through various databases, including a missing persons database, and the search yielded no results. On May 2 and May 3, 2017, further investigative efforts were undertaken to locate the Ms. Walford's next of kin, again yielding no results. On May 4, 2017, the body was approved for burial. On May 23, 2017, the body was not yet buried and further investigative efforts took

place to locate the next of kin, which again yielded negative results. On May 31, 2017, Ms. Walford was buried in the City cemetery on Hart Island (Potter's Field).

In August 2017, plaintiff conducted a google search for her mother and discovered that she was deceased and buried in Potter's Field. Thereafter, plaintiff contacted the OCME to gain possession of her mother's body for a proper burial. On November 29, 2017, Ms. Walford's body was exhumed and plaintiff was able to hold a funeral.

Applicable Law

It is well established that no cognizable cause of action exists for negligent investigation. *Coyne v State of New York*, 120 AD2d 769 [3d Dept 1986]. Because investigations involve the exercise of discretion and judgment, municipalities are therefore immunized from liability. *Mon v City of New York*, 78 NY2d 309 [1991].

Moreover, when a negligence claim is 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]). To determine whether a municipality is immune from liability for the actions or inactions of its employee, the duties, responsibilities and functions of the employee must be analyzed. *Rodriguez v New York*, 189 AD2d 166 [1st Dept 1993] internal citations omitted. 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]). Hence, for an injured party to prevail against a municipality, the party must demonstrate that the injury was caused by the negligent performance of a ministerial act or the existence of a special duty. *Rodriguez* 189 AD2d at 172.

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]).

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 AD3d 485, 488 [1st Dept 2011]).

Discussion

Plaintiff argues that the City failed to take reasonable and necessary steps to notify the next of kin. The cases cited by plaintiff to support her argument that the conduct in this case should be viewed as ministerial, are all distinguishable to this action. Specifically, the facts in those cases did not involve the exercise of discretion, as no investigation was required to ascertain the identity or next of kin of the decedent. The Court will discuss the cases in turn.

In *Tinney v City of New York* (94 AD3d 417 [1st Dept 2012]), the Court held that where the City defendants “had all necessary identifying documents,” the failure to timely inform the next of kin of their father’s death was a breach of a ministerial function, not a discretionary act. However, the First Department specifically limited that holding to the “circumstances presented” in that case. *Id.* The facts in *Tinney* are distinguishable to the instant matter.

In *Johnson v State* (37 NY2d 378 [1975]), the plaintiffs were falsely advised that their mother died and as a result incurred funeral expenses and alleged emotional harm. The Court of

Appeals, held that the hospital violated its own procedures and negligently sent the wrong message. *Johnson* is also distinguishable to the case at bar, as it involves an affirmative negligent act and here, plaintiff alleges the negligence was nonfeasance.

In *Melfi v Mount Sinai Hospital* 64 AD3d 26, the decedent was alive and conscious at the time he was taken to the hospital and was able to provide identifying information as well as the identity of his next of kin. The First Department held that there was a question of fact as to whether a reasonable and diligent inquiry was made to locate the next of kin. There, unlike in the instant action, the record was silent as to any effort made to locate or identify the next of kin notwithstanding the fact that the information was provided by the decedent. The opinion is also silent as to whether the notification of the next of kin is ministerial or discretionary in nature.

In *Rugova* 132 AD3d 220, the decedent was the operator of a motor vehicle that was involved in a collision. The decedent had a drivers license, which listed his home address where he resided with his parents and sister. Moreover, the New York City Police Department was supposed to contact the registered owner of the vehicle. Plaintiff heavily relies on this case because the City made very similar arguments there, as it does here, and those arguments were rejected. However, the facts in *Rugova* are clearly distinguishable to the facts in the instant action and therefore the City's arguments do not warrant rejection. The First Department stated in *Rugova* that "under the facts at bar there was no need to undertake an investigation that would implicate the exercise of discretion". Clearly that is not the case here.

An investigation was absolutely necessary here, as Ms. Walford arrived at the OCME as Jane Doe. Ms. Walford was found without identification and was not identified until in the custody of OCME. Therefore, plaintiff's argument that a search of records at Bellevue would have produced the identity of the next of kin is without merit. Logically, then plaintiff's theory

is one of negligent investigation which, as noted above, is not a viable cause of action in this jurisdiction. Plaintiff has not pled or established that a special duty was conferred onto the plaintiff and the Court rejects the argument that the City failed to perform a ministerial act. Accordingly, it is hereby

ORDERED that defendants' motion is granted in its entirety; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that the action is dismissed.

5/20/2020
DATE

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

[Signature]
HON. LYLE E. FRANK J.S.C.