Fowler v County of Suffolk
2020 NY Slip Op 31945(U)
May 13, 2020
Supreme Court, Suffolk County
Docket Number: 10-37818
Judge: Sanford Neil Berland

[* 1]

SHORT FORM ORDER

INDEX No. 10-37818

CAL. No. 17-02293OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice Supreme Court

MOTION DATE 4-30-18
ADJ. DATE 8-7-18
Mot. Seq. # 005 - MD

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MICHELLE FOWLER,

Plaintiff,

- against -

COUNTY OF SUFFOLK,

Defendant.

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SULLIVAN PAPAIN BLOCK MCGRATH
Attorney for Plaintiff
1140 Franklin Avenue, Suite 200
Garden City, New York 11530

DENNIS M. BROWN, ESQ.
SUFFOLK COUNTY ATTORNEY
Attorney for Defendant
H. Lee Dennison Building
P.O. Box 6100
100 Veterans Memorial Highway
Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 28 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 7; Answering Affidavits and supporting papers, 8 - 26; and Replying Affidavits and supporting papers 27 – 28, it is,

ORDERED that the motion by defendant, for summary judgment dismissing the complaint and all claims against it, is denied.

This action was commenced by plaintiff Michelle Fowler to recover for injuries she claims she sustained because the defendant's police department failed to protect her from a violent attack on October 20, 2009. By her bill of particulars, plaintiff alleges, among other things, that the Suffolk

County Police Department (the "SCPD") failed to arrest her husband, Darryl Fowler, for violation of an order of protection before he unlawfully entered her home and shot her 10 times; failed to prevent Mr. Fowler from assaulting her; failed to "follow established guidelines for dealing with domestic violence"; failed to warn her "of her protective options"; and failed to inform her that Mr. Fowler, who had threatened her life, had not been arrested in the hours after she had made her complaint to them, despite the police department's representation that it would do so.

Defendant County of Suffolk (the "County") now moves for summary judgment in its favor, arguing that it enjoys governmental immunity and that absent a special relationship, it cannot be held liable for the criminal actions of a third party. In support of its motion, it submits copies of the pleadings, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony and a transcript of plaintiff's deposition testimony.

The following facts are largely undisputed: Plaintiff married Darryl Fowler on August 3, 2007. Plaintiff's first interaction with defendant occurred on April 12, 2009, when she called 911 because Mr. Fowler was arguing with her 15-year-old daughter. Suffolk County Police Department officers were dispatched to her home. At that time, although informing the police officers that Daryl Fowler had restrained her against her will and verbally assaulted her daughters, she declined the police officers' offer to arrest him because she feared retribution. Instead, the next day she applied for, and was granted, a temporary order of protection that required Daryl Fowler to "stay away" from her. On April 20, 2009, the temporary order of protection was modified to allow communication between plaintiff and Mr. Fowler. Plaintiff testified that between June and August of 2009, she allowed Mr. Fowler to collect belongings from her house on three occasions without incident.

On September 28, 2009, plaintiff learned that Mr. Fowler had entered her gated community, prompting her to call the police. Minutes later, Mr. Fowler arrived at plaintiff's residence and "kicked in" the front door. No further physical violence occurred after Mr. Fowler entered the residence, and he departed soon after, before the police arrived. Plaintiff testified that she followed the responding police officer back to SCPD's Sixth Precinct, where she gave them a statement concerning the incident. While at the precinct, plaintiff learned that Mr. Fowler had been apprehended and arrested on charges of criminal contempt and criminal mischief. The following day, plaintiff attended Mr. Fowler's arraignment in District Court, at which time she requested that the existing temporary order of protection be modified and restored to a "stay away" order barring Mr. Fowler from any contact with her whatsoever. Plaintiff's application was granted.

Plaintiff testified that in the time after Mr. Fowler's arrest and arraignment and prior to the shooting that led to the current action, Mr. Fowler called to let her know that he had been hired to work at Suffolk Community College's Brentwood campus, the same campus where she was employed as a professor. This prompted her to contact both the school's director of security

and its vice-president of human resources to inform them of the order protection against Mr. Fowler. According to plaintiff, this led to Mr. Fowler being terminated.

According to plaintiff, on October 20, 2009, at 3:50 p.m., while she was at Suffolk Community College, she received a call on her cell phone from Mr. Fowler. Plaintiff testified that she accepted the call but "did not say one word." According to plaintiff, despite her silence, Mr. Fowler stated "You fucked up. You went too far. I am going to get you." Also according to plaintiff, Mr. Fowler shortly thereafter called her again, this time on her work phone, threatening her further, which prompted her to travel to the Sixth Precinct report the incident and to file a complaint. According to her account, she arrived at the precinct at approximately 5:00 p.m. and informed the police officer that she wanted to report a violation of an order of protection. Plaintiff testified that the officer took some information from her as she spoke, typed it into his computer and then told her to sit down until her name was called.

At approximately 5:30 p.m., Officer Barr invited her into his office and interviewed her, took her statement at 6:35 p.m. and obtained evidence from her cellular phone. Plaintiff testified that she was extremely frightened that Mr. Fowler would hurt her and that she remained at the precinct and "would not leave until [Officer Barr] promised [her] that he was going to pick him up." Asked to recount Officer Barr's exact statements to her, she testified that he told her "I promise you I will pick him up. I promise you that I will do it myself. I am going to take care of this." Plaintiff testified that she left the police precinct at some time between 7:00 p.m. and 7:30 p.m., and then stopped at her mother's house. She stated that after recounting to her mother Mr. Fowler's threats, her mother urged her and her 16-year-old daughter, Chelsea, who was home alone at that moment, to spend the night at the mother's home. Plaintiff declined, telling her mother that Chelsea was busy with homework and that, regardless, Officer Barr "promised [her] he is going to pick him up."

Plaintiff testified that after spending a short amount of time with her mother, she drove home, arriving at "a little after 7 [p.m.]." She indicated that she went to bed at "about 9:30 [p.m.] maybe," heard a loud noise, and then saw Mr. Fowler kick in her bedroom door. Asked to explain what occurred next, plaintiff stated that Mr. Fowler wordlessly entered her bedroom and shot her multiple times. Eventually, she was able to escape to her daughter's room, where she collapsed.

A party moving for summary judgment "must make 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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact requiring a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29

NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn from them are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

When a negligence claim is asserted against a municipality, the first issue for the 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" (***Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.***, 28 NY3d 709, 713, 49 NYS3d 362 [2017], *quoting* ***Applewhite v Accuhealth, Inc.***, 21 NY3d 420, 425, 972 NYS2d 169 [2013] [internal quotations omitted]). As relevant here, a municipality "will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*id.* [internal quotation marks omitted]). "Once it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a duty to the injured party" (***Santaiti v Town of Ramapo***, 162 AD3d 921, 924, 80 NYS3d 288 [2d Dept 2018]).

New York does not recognize a cause of action sounding in negligent investigation or negligent prosecution (***Hines v City of New York***, 142 AD3d 586, 587, 37 NYS3d 136 [2d Dept 2016]). Generally, a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection (***Axt v Hyde Park Police Dept.***, 162 AD3d 728, 729, 80 NYS3d 72 [2d Dept 2018], *quoting* ***Etienne v New York City Police Dept.***, 37 AD3d 647, 649, 830 NYS2d 349 [2d Dept 2007]). "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be" (***McLean v City of New York***, 12 NY3d 194, 203, 878 NYS2d 238 [2009]). Discretionary acts "involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (***Tango v Tulevech***, 61 NY2d 34, 41, 471 NYS2d 73 [1983]). If a municipality's actions are ministerial, liability may be imposed upon it if it owed plaintiff a duty "born of a special relationship between the claimant and the public entity" (***Gonzalez v State of New York***, 156 AD3d 764, 764, 65 NYS3d 719 [2d Dept 2017]).

"Liability for a claim that a municipality negligently exercised a governmental function 'turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public' (***Garrett v. Holiday Inns***, 58 N.Y.2d 253, 261, 460 N.Y.S.2d 774, 447 N.E.2d 717 [1983]; *see* ***Laratro v. City of New York***, 8 N.Y.3d 79, 828 N.Y.S.2d 280, 861 N.E.2d 95 [2006]; ***Cuffy v. City of New York***, 69 N.Y.2d 255, 513 N.Y.S.2d 372, 505 N.E.2d 937 [1987]). '[A] duty to exercise reasonable care toward [a] plaintiff' is 'born of a special relationship between the plaintiff and the governmental entity' (***Pelaez v. Seide***, 2 N.Y.3d 186, 198–199, 778 N.Y.S.2d 111, 810 N.E.2d 393 [2004])" (***Coleson v City of New York,*** 24 NY3d

476, 481 [2014].) "[A] special relationship can be formed in three ways: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*id.*, *citing* ***Pelaez***, *supra*, 2 N.Y.3d at 199–200).

With respect to the second way a special relationship can be formed between an individual and a governmental entity, the Court of Appeals has held that "the requisite elements for a duty voluntarily assumed" 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"

(***Coleson v City of New York***, *supra*, 24 NY3d at 481, *quoting* ***Cuffy v. City of New York***, *supra*, 69 N.Y.2d 260). Notably, "[t]he assurance by the municipal defendant must be definite enough to generate justifiable reliance by the plaintiff" (***Dinardo v City of New York***, 13 NY3d 872, 874, 893 NYS2d 818 [2009]), and it is the plaintiff's ultimate burden to demonstrate that defendant's "conduct actually lulled them into a false sense of security, induced them to either relax their own vigilance or forego other avenues of protection, and thereby placed themselves in a worse position than they would have been had the defendants never assumed the duty" (***Conde v City of New York***, 24 AD3d 595, 597, 808 NYS2d 347 [2d Dept 2005]). However, on a motion for summary judgment, the burden is on the moving party affirmatively to demonstrate its *prima facie* entitlement to summary judgment; it cannot "satisfy its prima facie burden by merely pointing out gaps in the plaintiff's case" (***Blackwell v Mikevin Mgt. III, LLC***, 88 AD3d 836, 837 [2d Dept 2011]).

Here, the defendant endeavored to establish a *prima facie* case of entitlement to summary judgment by proffering evidence indicating that the SCPD's acts on the date in question were "governmental" and "discretionary" (*see* ***McLean v City of New York***, *supra*; *see also* ***Rodriguez v Town of Clarkstown Police Dept.***, 123 AD3d 690, 999 NYS2d 422 [2d Dept 2014]; ***Bawa v City of New York***, 94 AD3d 926, 942 NYS2d 191 [2d Dept 2012]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff testified that she visited the Sixth Precinct, took the various steps necessary to make a criminal complaint against Mr. Fowler for his alleged violation of the terms of an order of protection, and was informed that he would be arrested. Officer Barr's acts entailed making the determination of whether probable cause existed for Mr. Fowler's arrest, what Mr. Fowler's probable location was and the method by which Mr. Fowler's arrest would be effectuated. The County argues that each of those determinations involved the "exercise of reasoned judgment which could typically produce different acceptable results" (*see* ***Tango v***

Tulevech, *supra*). To the extent the County's submissions establish a *prima facie* case for judgment in its favor, the burden shifted to plaintiff to raise a triable issue of material fact (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition, plaintiff disputes the defendant's legal and factual characterization of the conduct upon which her claims are based and argues that triable issues remain with respect to whether the defendant is entitled to governmental immunity, whether she justifiably relied upon the defendant's representations to her regarding the protection that was being afforded to her and whether the defendant was "reasonable in securing protection" for her. In support of her arguments, plaintiff submits, among other things, a copy of her "supporting deposition" relating to the April 12, 2009 incident; a copy of her October 20, 2009 statement; transcripts of the deposition testimony of Police Officer Michael Barr, nonparty Rachel Hernandez, Police Officer Matthew Kenneally and Police Officer Stephen Budway; an affidavit of plaintiff's expert, Joseph Stine; and a copy of Internal Affairs Bureau "internal correspondence."

Police Officer Michael Barr testified that on October 20, 2009, he arrived at the Sixth Precinct at 5:00 p.m. to commence his eight-hour tour of duty. He stated that he met plaintiff for the first time at 5:30 p.m., but only after the officer at the precinct's front desk, Officer Kenneally, completed a "domestic violence report" with her. Officer Barr testified that he intended to take plaintiff's statement alleging that Mr. Fowler violated an order of protection, so he met her in the precinct's lobby and escorted her to an interview room. Asked what plaintiff's demeanor was at that time, he testified that she "did not seem nervous or anxious at all."

Officer Barr stated that over the course of approximately one hour, he had a conversation with plaintiff, took pictures of plaintiff's phone, and drafted a statement. He indicated that the advocate from the Suffolk County Coalition Against Domestic Violence, Rachel Hernandez, entered the interview room at some point. He stated that Ms. Hernandez had a desk in the precinct, approximately 15 feet from the interview room's door, and that plaintiff initiated conversation with her during the interview. Plaintiff's initiation of contact with her led Ms. Hernandez to spend between five and thirty minutes in the interview room that evening. Asked whether a violation of an order of protection is a "serious" matter, Officer Barr acknowledged that it was, because "[d]omestics take priority" and "[p]eople can get hurt." He testified that after plaintiff signed and dated her statement, he told her he "would go look to arrest him." Upon questioning, Officer Barr denied telling plaintiff that he would arrest Mr. Fowler "immediately," but that he would "look to arrest" Mr. Fowler "that evening" and, "if not, [he] would do a warrant request [to the court]." Officer Barr also denied that plaintiff refused to leave the precinct until she received assurances that he would arrest Mr. Fowler that evening.

Officer Barr testified that he did not leave the precinct for the purpose of arresting Mr. Fowler until two hours had elapsed from the time plaintiff left. He stated that there was no "specific reason" why he waited two hours, but that he "researched [Mr. Fowler's] address, got a picture of [Mr. Fowler], reviewed the orders of protection, [and] called the Sheriff's Department to get a copy of the order of protection." He further stated that there is no police policy or

procedure stating a time frame in which an arrest is to be made. Rather, he indicated that there must be "an initial attempt" to make an arrest and, if that fails, a warrant request is made. Officer Barr testified that he and Officer Budway drove an unmarked police vehicle to Amityville in an attempt to find Mr. Fowler. He stated that they went to Mr. Fowler's house, that "[t]here was nobody there," and that the "incident [during which plaintiff was shot at her home] had already occurred when [they] got there."

Officer Barr testified that he and Officer Budway returned to the Sixth Precinct by midnight and that he drafted a report describing the night's events. Upon being shown portions of that report by questioning counsel, Officer Barr stated that during her interview, plaintiff was "advised of safe housing [options]," advised of her options regarding additional orders of protection, advised of her ability to have a panic alarm installed, and was given a "Domestic Violence Advocacy Information" form.

Nonparty Rachel Hernandez testified that in October of 2009, she was employed by the Suffolk County Coalition Against Domestic Violence (SCCADV) as the Sixth Precinct advocate. She stated that her duties included contacting victims "to see if they needed any services, counseling, shelters," assisting them "with going to court to get an order of protection," "safety planning," and providing referrals "to agencies or services that they were in need of." Ms. Hernandez stated that while she had a desk at the Sixth Precinct and used the SCPD's computer to access her employer's data, the SCPD had no affiliation with the SCCADV and had no access to its records. Ms. Hernandez testified that she had met plaintiff "[a] couple of years prior [to 2009]" and had assisted her in obtaining an order of protection against an unrelated individual. She stated that she also called plaintiff on the telephone "a couple of months before [she was shot]" to discuss a domestic incident report that had been filed at that time regarding Mr. Fowler kicking-in her door. Ms. Hernandez testified that while she provided plaintiff with counseling information, plaintiff "said she was not interested in any services at that time."

Ms. Hernandez testified that on the date in question, she observed plaintiff enter the Crime Section interview room and begin speaking to Officer Barr. She stated that as she recognized plaintiff, she entered the interview room uninvited and asked plaintiff "What is going on?" and "Is everything OK?" Ms. Hernandez indicated that plaintiff explained the situation and, knowing that plaintiff's current order of protection "was already at the maximum [restrictiveness] that it could be," discussed safe housing options with her. Ms. Hernandez testified that she told plaintiff that a shelter was available, which could house her and her daughter, but plaintiff declined, stating that "she had to work the next day and she was not going to go into a shelter." She stated that she, the plaintiff, and Officer Barr "came up with the safety plan that [plaintiff] would be going to her mother's [house] that evening and staying there." Ms. Hernandez further stated that she told plaintiff that if Mr. Fowler "was actually arrested," she would call her and let her know that she could go to his arraignment in the morning.

At his deposition, Police Officer Stephen Budway testified that on the night in question he was working, temporarily, in the Crime Section of the SCPD Sixth Precinct. Officer Budway

indicated that he saw Officer Barr interview plaintiff and that Ms. Hernandez was present during portions of that interview. He stated that shortly after plaintiff departed the Sixth Precinct, Officer Barr informed him of the details of plaintiff's case. Officer Budway testified that as he was only temporarily assigned to the Crime Section, Officer Barr used plaintiff's case to train him in various investigative techniques, including obtaining suspect photographs and "mapping an address." He indicated that such training consumed "only a few minutes." Officer Budway testified that Officer Barr eventually asked that he accompany him to "an address in Amityville where the suspect in the Fowler case lived."

Plaintiff also submits the expert affidavit of Joseph Stine, a former Chief of the New Britain Township Police Department in Pennsylvania. Mr. Stine states that his experience also includes 25 years in the Philadelphia Police Department in the ranks of Patrolman through Inspector. Mr. Stine avers that after his thorough evaluation of the evidentiary materials concerning the current matter, he formed opinions as to the propriety of the SCPD's actions. Generally, Mr. Stine opines that the SCPD "did not follow generally accepted practices and procedures and failed to protect plaintiff." Specifically, he states that the SCPD "violated generally accepted police procedure and policy" by promising to arrest Mr. Fowler that evening "since such a representation . . . causes the domestic violence victim . . . to unsafely rely on the arrest and to let their guard down." He further states that plaintiff "should have been informed of or strongly encouraged . . . to utilize the emergency shelter" or to stay with her mother.

In opposition to the County's motion, the plaintiff argues, first, that the SCPD's acts were ministerial because Mr. Fowler's alleged violation of the order of protection was a crime mandating arrest pursuant to Criminal Procedure Law § 140.10 (4)(b)(i). That subdivision provides in relevant part that

> [A] police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that . . . a duly served order of protection . . . is in effect . . . *and* [s]uch order directs that the respondent or defendant stay away from persons on whose behalf the order of protection or special order of conditions has been issued *and* the respondent or defendant committed an act or acts in violation of such "stay away" provision of such order

(*Id.* [emphasis added]). Here, the only evidence that Mr. Fowler "committed an act or acts in violation of the 'stay away' provision" of plaintiff's order of protection pursuant to Criminal Procedure Law § 140.10 (4) (b) (i) – prior to his breaking into her home later that evening and shooting her – is Mr. Fowler's acceptance a job on the same community college campus where plaintiff worked but from which he had been discharged. There is, however, evidence to support the contention that Mr. Fowler's alleged acts fell within the purview of Criminal Procedure Law § 140.10 (4) (b) (ii), which mandates arrest when an individual "commits a family offense as defined in subdivision one of section eight hundred twelve of the family court act or subdivision

one of section 530.11 of this chapter in violation of such order of protection." Thus, plaintiff established that the arrest of Mr. Fowler, following his alleged threatening telephone calls to plaintiff, was mandatory under the Criminal Procedure Law.

Quite apart from the question of whether in this case the mandate of Criminal Procedure Law § 140.10 (4) (b) (ii), in combination with the order of protection plaintiff had obtained against Mr. Fowler (of which the police officers unquestionably were aware) and the statement plaintiff gave at the precinct, is sufficient, without more, to provide a *prima facie* basis for the existence of the requisite "special relationship" between plaintiff and the police department, or municipality, under the "violates a statutory duty enacted for the benefit of a particular class of persons" standard articulated by the Court of Appeals (*see, e.g.*, ***Coleson v City of New York,*** *supra*, at 481; ***Pelaez v. Seide***, *supra*, 2 N.Y.3d at 199-200), thereby requiring denial of defendant's motion, plaintiff has also tendered sufficient receivable evidence to demonstrate that there are triable issues of fact with respect to whether a "special relationship" also arose from "a duty voluntary assumed" by the defendant to protect plaintiff from the threat of physical harm posed by Mr. Fowler.

"Whether a special relationship exists is generally a question for the jury" (***Coleson v City of New York***, 24 NY3d 476, 483 [2014], *citing* ***De Long v. County of Erie***, 60 N.Y.2d 296, 306, 469 N.Y.S.2d 611, 457 N.E.2d 717 [1983]). The County, in its memorandum of law, essentially concedes that should the Court find that Mr. Fowler's arrest was a "ministerial" act – as it has, above[1] – then plaintiff has fulfilled the first three prongs of the test for a "special relationship" based upon a duty voluntarily assumed (*see* ***Gonzalez v State of New York***, *supra*; ***Cuffy v New York***, *supra*). The question, then, on the County's motion for summary judgment, is whether there plaintiff's submissions are sufficient to demonstrate the existence of an issue of fact as to whether her reliance on the municipality's affirmative undertaking was justifiable.

The defendant makes much of the parties' differing accounts concerning the domestic violence-related information provided to plaintiff during the time she was present at the Sixth Precinct. Officer Barr and Ms. Hernandez each testified that they supplied plaintiff with numerous resources with which she could enhance her personal safety, including a shelter for herself and her teenage daughter. Plaintiff, on the other hand, testified that she was not provided with any such support. The issue, however, is not the extent to which alternatives were made available to plaintiff – certainly, she does not dispute that she could have stayed at her mother's home – but whether the obligation to arrest Mr. Fowler for his alleged violation of the terms of the order of protection, accompanied by the representations made to her by Officer Barr with respect to effectuating that arrest that evening created a justifiable reliance on plaintiff's part that she could safely return to her home. Here, plaintiff testified that Officer Barr had given her uncategorical assurances that Mr. Fowler would not be a threat to her: "I promise you I will pick

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[1] Query, however, whether such a determination is necessary if the other factors for finding the existence of a special relationship on the basis of a duty voluntarily assumed are met. *See* ***Coleson v City of New York,*** *supra, passim*.

[Mr. Fowler] up. I promise you that I will do it myself. I am going to take care of this." That such representations are in one sense prospective – albeit promising immediate action – in contrast to the mixed statements that were attributed to the police officers by the plaintiff in ***Coleson v City of New York,*** *supra*, may weigh in the ultimate assessment, by the jury, of the reasonableness of plaintiff's reliance upon them, but it cannot be said that plaintiff's expectation, as a matter of law on the current record, was unreasonable. On the contrary, on a motion for summary judgment, as noted above, the facts alleged by the opposing party and all inferences that may be drawn from them are to be accepted as true (*see* ***Roth v Barreto,*** *supra*; ***O'Neill v Fishkill,*** *supra*). While the defendant argues that the representations alleged here by plaintiff differ in the degree of reassurance offered when compared with those alleged in other cases in which duties have been imposed upon municipalities (*see, e.g.*, ***Mastroianni v County of Suffolk***, 91 NY2d 198, 668 NYS2d 542 [1997] (police officers left plaintiff's location without notice, despite spending an extended period of time monitoring her home); ***Hanna v St. Lawrence County***, 34 AD3d 1146, 825 NYS2d 798 [3d Dept 2006] (plaintiff raised a triable issue by demonstrating that defendant overstated the efficacy of an electronic monitoring ankle bracelet controlling assailant's movements)), issues both of credibility and of the reasonableness of plaintiff's reliance and conduct are for the jury to determine (***Hanna v St. Lawrence County***, *supra*; ***Roth v Barreto,*** *supra*; ***O'Neill v Fishkill,*** *supra*; ***Levy v City of New York***, 232 AD2d 160, 161 [1st Dept 1996]).

Accordingly, the motion by defendant for summary judgment dismissing the complaint against it is denied.

The foregoing constitutes the decision and order of the court.

Dated: May 13, 2020

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ FINAL DISPOSITION **__XX__ NON-FINAL DISPOSITION**