

Shatravka v City of New York
2020 NY Slip Op 32967(U)
September 8, 2020
Supreme Court, New York County
Docket Number: 159928/2013
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 5

Justice

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MICHAEL SHATRAVKA,
Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT,
Defendants.

INDEX NO. 159928/2013
MOTION DATE 9/8/20
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number, were considered on this motion to dismiss: (sequence 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123

Plaintiff commenced this action against the City of New York and New York City Police Department ("NYPD," collectively the "City") to recover damages for personal injuries sustained in a May 23, 2013 motor vehicle accident at 34th Street and Third Avenue, New York, New York. Plaintiff alleges, in sum and substance, that an NYPD Traffic Enforcement Agent ("Traffic Agent") negligently directed a Metropolitan Transit Authority ("MTA") bus through the intersection, causing Plaintiff—who was riding a motorcycle—to crash into the bus and sustain injuries.1 The City now moves, pursuant to CPLR 3211 and 3212, to dismiss the Complaint. Plaintiff opposes. For the reasons below, the motion is granted and the Complaint is dismissed.

BACKGROUND AND PROCEDURAL HISTORY

NYPD Officer Nicole Cotumaccio, who responded to the scene of the subject incident, completed the Police Accident Report/MV-104AN "[b]ased on ... information ... received from the investigating detectives, writing that the subject intersection "was under control of NYPD Traffic Agent. [Northbound] traffic on 3rd Avenue was stopped, and [eastbound and westbound] traffic on 34th Street was being pulled. [Plaintiff] entered intersection while traveling at a high rate of speed [northbound] on 3rd, and struck left front of bus" (NYSCEF 112 pp 1, 4).

Plaintiff testified at his General Municipal Law ("GML") § 50-h hearing that just prior to the subject incident, he was traveling "at approximately 25 to 30 miles per hour" northbound on Third Avenue and saw an MTA bus slightly to his right, traveling westbound on 34th Street, less than two seconds before the accident (NYSCEF 103 ["50-h"] 19-23). Plaintiff collided with the driver's side of the bus when he was "almost through" the intersection (50-h 22, et seq.). Plaintiff had a green light (50-h 31:7-10). Plaintiff denied directly observing "any police directing

1 The City also commenced a third-party action against the MTA and the bus driver, Jennifer Hernandez, which it voluntarily discontinued on September 18, 2015 (NYSCEF 18).

traffic”; he testified that he learned about Traffic Agent involvement later, from the Police Accident Report (50-h 32:2-33:3). Plaintiff’s subsequent deposition testimony substantively matched his 50-h testimony (NYSCEF 109 [“Pl EBT”]).

The Traffic Agent was Wendy Magarin, who was also deposed (NYSCEF 110 [“Magarin EBT”]). Magarin testified that at the approximate time of the accident, between 8 and 9 a.m., she observed two ambulances approaching the subject intersection from 34th Street with their sirens and lights on, about fifteen car lengths away (Magarin EBT 64, *et seq.*). At the time that Magarin stopped traffic on Third Avenue to pull the 34th Street traffic, the Third Avenue traffic light was green (Magarin EBT 75:12-15).

The MTA bus driver, Hernandez, was also deposed (NYSCEF 111 [“Hernandez EBT”]). Hernandez testified that, as she approached the subject intersection traveling westbound on 34th Street, she observed a red light and Traffic Agent Magarin (Hernandez EBT 20, *et seq.*). Hernandez remained stopped until Magarin directed the vehicles in Hernandez’s lane to move forward using both hands at shoulder height and a whistle; Magarin testified that she complied, and drove “very slowly,” about 5 to 10 miles per hour. Magarin denied using the accelerator between moving forward at Magarin’s instruction to the point of impact (Hernandez EBT 38:9-45:15, 66:23-67:5). Magarin characterized the delay between the bus’s movement and the impact as “maybe one second” (Hernandez EBT 66:14).

The Complaint (NYSCEF 85) alleges six causes of action: negligence, negligent hiring, training, retention and supervision, and failure to warn, all of which amount to a central argument that the City was responsible for hiring Traffic Agent Magarin, who waved the MTA bus through a red light, allegedly causing Plaintiff to crash into it. In support of its motion for summary judgment, the City argues: (1) that Plaintiff has failed to plead a special duty; (2) there is no special duty; (3) the Traffic Agent’s discretionary actions are protected by governmental immunity; (4) even if the City owed Plaintiff a duty, the Traffic Agent’s conduct was not the proximate cause of Plaintiff’s injuries; and (5) any claim regarding a malfunctioning traffic light fails because the City did not have notice of any malfunctioning light.²

DISCUSSION

Summary judgment is a “drastic remedy” and will only be granted in the absence of any material issues of fact (*id.*). To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant’s initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant’s papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an

² The final argument is a red herring, as no claim of a malfunctioning light is present in the Complaint.

acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

As an initial matter, the City has not met its *prima facie* burden with respect to its argument that Plaintiff's actions, not the Traffic Agent's, were the proximate cause of Plaintiff's injuries. This is, as Plaintiff argues in opposition, "speculative" (*NYSCEF 117* ¶ 46), and at minimum, an issue of comparative negligence for the jury. Accordingly, the Court denies that branch of the motion.

With respect to the City's duty and immunity arguments, "a public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent" (*Valdez v City of NY*, 18 NY3d 69, 76 [2011]). "[G]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*id.* at 76-77 [2011]). Included among the functions subject to immunity is the "discretionary act[]" of "managing pedestrian and vehicular traffic undertaken in furtherance of public safety" (*Devivo v Adeyemo*, 70 AD3d 587, 587 [1st Dept 2010]; see also *Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997] ["Like crime prevention, traffic regulation is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers."]; see also *Miller v City of NY*, 116 AD3d 829, 830 [2d Dept 2014] [dismissing action in which the plaintiffs had the green light and traffic officer directed vehicle traveling in opposite direction to proceed through red light, striking plaintiffs, because the "allegedly negligent acts of the defendant traffic enforcement agent were discretionary and not ministerial"]; *Santos v County of Westchester*, 81 AD3d 710, 711 [2d Dept 2011] [The City met its burden of establishing its *prima facie* entitlement to summary judgment by establishing that its traffic enforcement agent was performing a discretionary act immune from liability where the agent directed the plaintiffs' vehicle to make a turn, thereby causing it to collide with the defendants' bus traveling through a green light in its favor]).

A special relationship or duty to an injured person 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" (*McLean v City of NY*, 12 NY3d 194, 199 [2009]). In order to pursue a negligence action against the City, Plaintiff was required to plead a special duty (*Valdez v City of NY*, 18 NY3d 69, 75 [2011]). Prior to pleading the claims in a complaint, GML § 50-e requires a claimant against a municipal corporation to file a notice of claim within ninety days after the claim arises, which must include the nature of the claim and the manner in which it arose (GML § 50-e[1][a], [2]). "The purpose of the notice of claim requirement is to afford the public corporation an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available" (*Brown v NY City Tr. Auth.*, 172 AD2d 178, 180 [1st Dept 1991]).

"Merely providing notice of the occurrence is not adequate to constitute notice of a particular claim"; that is, the notice of claim must also reasonably apprise the municipal

defendant(s) of potential theories of liability (*Brown v NY City Tr. Auth.*, 172 AD2d 178, 180-181 [1st Dept 1991] [granting summary judgment where the only theory of liability in notice of claim related to the condition of a bus stop sign, meaning that “there was no way that the Transit Authority could be deemed to have received notice that plaintiffs might also assert, for instance, the absence of safe access to the bus”]). Theories of liability which must be mentioned in a notice of claim include, as relevant here, claims of negligent hiring and retention and the assumption and breach of a special duty which overcomes the governmental function immunity defense (*see Shmueli v NY City Police Dept.*, 295 AD2d 271 [1st Dept 2002] [affirming dismissal of claim against District Attorney for negligent hiring, supervision and training where notice of claim “failed to assert such a claim or allege any facts from which defendant could have gleaned plaintiff’s intention to raise such a claim”]; *Blackstock v Bd. of Educ. of the City of NY*, 84 AD3d 524, 524 [1st Dept 2011] [A plaintiff’s failure “to allege or provide the factual predicate for the special relationship theory in her notice of claim or complaint is fatal to maintenance of this action.”]). Here, while Plaintiff correctly argues that the Complaint contains special duty and negligent hiring, training, and retention claims (Complaint ¶¶ 11, 13, 14, 21, 23), Plaintiff’s opposition does not deny that those claims are absent from the Notice of Claim. Because the timeframe to amend the Notice of Claim expired years ago, and in the absence of any attempt here to amend it, dismissal of all claims for failure to include them in the Notice of Claim is warranted.

Even if the Notice of Claim had included a special duty allegation, the Court agrees with the City’s argument that the negligence and failure to warn claims would nevertheless be dismissed. As the City argues, to avoid dismissal, a complaint must not only allege a special relationship theory, but also provide a factual predicate for that theory (*Rollins v NY City Bd. of Educ.*, 68 AD3d 540, 541 [1st Dept 2009] [“Since [the plaintiff] raised neither that legal theory nor the factual predicate -- an alleged oral promise and policy with the special education dean -- in her notice of claim or her complaint, she could not assert that theory or the facts underlying it for the first time in opposition to the motion for summary judgment”]). To the extent that Plaintiff, in an affidavit attached to the opposition papers, appears to argue for the first time that he “noticed a traffic agent within the intersection ... [who] waved a hand in my direction indicating to proceed into the intersection,” this does not, as Plaintiff argues “merely supplement[] the record with additional detail” (*NYSCEF 117* ¶ 42). Rather, as the City highlights in reply, Plaintiff’s affidavit utterly contradicts Plaintiff’s 50-h testimony (50-h 21:8-10, 32:1-13):

Q: Do you know of any witnesses to the accident?

A: No.

Q: Did you see any police directing traffic at that intersection at that time?

A: No.

Q: Did you learn from any source that there had been?

A: Yeah.

Q: From what source?

A: From the police report.

Q: What did the police report say about that?

A: I think it said there was like a traffic agent that was pulling traffic.

The affidavit also contradicted Plaintiff's EBT testimony (*Pl EBT* 58:13-19, 68:6-15):

Q: Prior to entering the intersection, did you notice a traffic agent anywhere directing traffic within that intersection?

A: No.

Q: Did you ever come to learn that there was a traffic agent within the intersection? A: After the

A: After the accident.

Q: Who told you that there was a traffic agent at the intersection where your accident occurred?

...

A: Who told me? I don't remember.

Plaintiff's counsel's efforts to parse the testimony, (*see NYSCEF 117 ¶ 24, et seq.*), ignore the plain meaning of the most direct questions and responses: Plaintiff was asked at both the 50-h and EBT if he saw police or a traffic agent directing traffic, and responded that he did not (*cf Cox v McCormick Farms, Inc.*, 144 AD3d 1533, 40 NYS3d 837 [4th Dept 2016] [where question was not directly asked in deposition, it was proper to consider subsequent affidavit providing greater specificity without directly contradicting deposition testimony]). Because a self-serving affidavit offered to contradict deposition testimony or retract a prior admission does not raise a bona fide issue of fact, it can be disregarded (*Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 253 [1st Dept 2011]). Accordingly, Plaintiff is bound to his testimony—given twice—that he did not observe a traffic agent in the intersection, and therefore the traffic agent could not have voluntarily assumed a special duty. Without any special duty, irrespective of the events depicted in the video of the event or any other arguments asserted by Plaintiff regarding the traffic officer's negligence, the City cannot be held liable because the Traffic Agent's actions were unquestionably a discretionary act entitled to immunity. Accordingly, summary judgment is appropriate.

CONCLUSION/ORDER

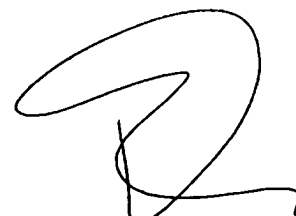
For the reasons above, it is

ORDERED that Defendants' motion for summary judgment (003) is **GRANTED**, and the Clerk of Court shall enter judgment dismissing the Complaint; and it is further

ORDERED that the Clerk of Court shall, to the extent not already done, mark the Third-Party Action disposed in accordance with Defendants' stipulation of voluntary discontinuance (*NYSCEF 18*); and it is further

ORDERED that Defendants shall, within 30 days, e-file and serve upon Plaintiff a copy of this order with notice of entry.

This constitutes the decision and order of the Court.



9/8/2020
DATE

CITY WAITING LIST, 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"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE