SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 36

Present: **HON. STEVEN M. JAEGER**

MICHAEL CANBERG and PATRICIA CANBERG,

Plaintiffs,

-against-

THE COUNTY OF NASSAU, JOHN DOES 1-10, ABC CORPS, 1-10,

Defendant.

Index No.:604692/2016
Motion Seq. Nos.: 003, 004
Motion Submit Date: 02/11/20
Decision & Order

Upon the foregoing papers, the motion (Mot. Seq. No. 003) by the Defendant COUNTY FO NASSAU seeking an order pursuant to CPLR § 3212, dismissing the complaint of the Plaintiffs; and Plaintiffs' cross-motion (Mot. Seq. No. 004), presumably pursuant to CPLR § 3025(b), for leave to amend the Complaint herein in the form annexed to the moving papers, are determined as hereinafter provided.

This is an action for personal injuries alleged sustained by Plaintiffs. Plaintiffs commenced this action by electronic filing of a Summons and Complaint on June 23, 2016 alleging causes of action sounding in negligence, gross negligence and loss of consortium.

The complaint alleges that on August 9, 2015, shortly after 6:00a.m., Plaintiff Michael Canberg, who at the time was sixty-two years old, while visiting family at 8 Byrd Street, Massapequa Park, New York experienced a seizure while asleep. Upon calling 911,

Emergency Medical Services of Nassau County and officers from Nassau County Police Department responded to the call. Plaintiffs contend that because of the actions of one of the Nassau County police officers, Mr. Canberg was caused to injuries which include but are not limited to (1) separation of the rotator cuff in the left shoulder, fracture of three thoracic vertebrae and a biceps medial dislocation.

It is undisputed that Plaintiffs caused a Notice of Claim to be timely served upon Nassau County (Notice of Claim is annexed to Defendant's Notice of Motion as Exhibit "B"), and thereafter, timely filed the Summons and Complaint. On July 12, 2016, issue was joined with the filing of the County's Verified Answer.

Defendant, Nassau County now seeks dismissal of the complaint on the basis that Plaintiffs cannot prove a prima facie case.

First, Defendant contends that the complaint must be dismissed as Plaintiffs failed to comply with G.M.L. § 50-i(1). Specifically, Plaintiffs failed to plead in their complaint that a Notice of Claim was served upon the Defendant; that at least thirty (30) days have elapsed since such, and that the Defendant has refused or neglected to adjust the claim.

Next, Defendant argues that the County is immune from liability because the acts of which Plaintiffs complain were "discretionary" governmental acts for which there can be no liability. Additionally, it is the County's position that Plaintiffs did not claim or plead that a "special duty" ran from the County to the Plaintiffs either in their Notice of Claim or the complaint. Defendant argues that Plaintiffs may not now interpose any additional cause of action which were not referred to in the original Notice of Claim. and

as such, liability, as a matter of law, cannot be assessed against the County unless Plaintiff can make out a prima facie case of negligence. Finally, Defendant contends that Plaintiff Patricia Canberg is not a proper party to the action as she was not named in the Notice of Claim.

In opposition to Defendant's application, Plaintiffs argue inter alia that they complied with the statutory requirements of G.M.L. § 50(e) as it timely served the Notice of Claim upon the Nassau County and commenced the action within one (1) year and ninety (90) from the date the cause of action accrued. Plaintiffs contend that where there is substantial compliance with the notice of claim requirements, dismissal is inappropriate and not warranted. Further, Plaintiffs argue that Defendant County acknowledged receipt of the Notice of Claim within its demand for Plaintiff's appearance for a hearing pursuant to §50-h of the General Municipal Law and had knowledge of the Plaintiff's injuries and claims prior to the filing of the complaint. Next, Plaintiffs contend that they have pled a prima facie case against the Defendants and that are genuine issues of material fact exist concerning the special duty owed to Plaintiffs. Plaintiffs argue that Defendants must not be allowed to argue a defense of immunity or special duty as they failed to allege and/or assert same as an affirmative defense in their answer to the complaint. Though Plaintiffs argue that a governmental entity providing medical care falls into the category of proprietary and not discretionary activity, Plaintiffs claim that they have already established the existence of a special duty owed by Defendant or an issue of fact regarding same. Finally, Plaintiffs argue that the claim for loss of consortium asserted by Patricia

Canberg should not be dismissed as it is based on the same set of facts already alleged in the Notice of Claim. Consequently, Plaintiffs move to amend the Notice of Claim to include Patricia Canberg as a claimant.

On a motion for summary judgment, the moving party has the burden to establish "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" (*Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party meets this burden, the burden then shifts to the non-moving party to "establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

"The elements of a cause of action alleging negligence are the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach proximately caused the injury" (*Mitchell v Icolari*, 108 AD3d 600 [2d Dept 2013]; *see Turcotte v Fell*, 68 NY2d 432, 437 [1986]). 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, fire protection or ambulance services" (*Estate of Gail Radvin v City of New York*, 119 AD3d 730 [2d Dept 2014] quoting *Etienne v New York City Police Dept.*, 37 D3d 647, 649 [2d Dept 2007]).

When a negligence cause of action is asserted against a municipality, the court must determine "whether the municipal entity was engaged in a proprietary function or acted in a government capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21

NY3d 420, 425 [2013]). If the municipality's actions are proprietary in nature, "the municipality is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (*id.*). "[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.*, quoting *Sebastian v State of New York*, 93 NY2d 790, 793 [1991]). "A municipal emergency response system is 'a classic governmental, rather than proprietary, function' " (*Estate of Gail Radvin v City of New York*, *supra*, quoting *Applewhite v Accuhealth, Inc.*, *supra*, quoting *Valdez v City of New York*, 18 NY3d 69, 75 [2011).

Where it is determined that a municipality was exercising a governmental function, a municipality will not be held liable unless it owed a "special duty" to the injured party (*see Applewhite v Accuhealth, Inc.*, *supra* at 426). A "special duty" is "a duty to exercise reasonable care toward the plaintiff" and is "born of a special relationship between the plaintiff and the governmental entity" (*Coleson v City of New York*, 24 NY3d 476, 481 [2014] quoting *Pelaez v Seide*, 2 NY3d 186, 189, 198-199 [2004]).

> "[A] special duty can arise in three situations:
> (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition. It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself (*see Lauer*, 95 NY2d 95 at 100; *see also Valdez, supra* at 75). In situations where the plaintiff fails to meet this burden, the analysis ends

> and liability may not be imputed to the municipality that acted in a governmental capacity."

Pelaez, supra at 199-200.

To establish a special relationship against the County herein, which was exercising a governmental function, the Plaintiffs in this case must establish:

> "(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"

Estate of Gail Radvin v City of New York, *supra* at732, quoting *Cuffy v City of New York*, 69 NY2d 255, 260 (1987]; *see also*, *Valdez v City of New York*, 18 NY3d 69, 80 (2011).

Plaintiffs must satisfy each of the factors in order to establish a special relationship. Plaintiffs have adequately presented questions of fact on the issues. Where there are questions of fact associated the eventual determination as to whether the County owed a special duty to Plaintiffs, the County is not entitled to summary judgment dismissing the complaint against it. (*see Applewhite v Accuhealth, Inc.*, *supra* at 432)

Plaintiffs cross-moved for leave to amend the Notice of Claim to include Patricia Canberg as a claimant. "A party may amend its pleadings at any time by permission of the court, and leave should be freely given (*see* CPLR 3025[b]), 'provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit' " (*Cortes v Jing Jeng Hang*, 143 AD3d 854 [2d Dept 2016], quoting *Belus v Southside Hospital*, 106 AD3d 765 [2d Dept 2013], quoting *Douglas*

Elliman, LLC v Bergere, 98 AD3d 642, 643 [2d Dept 2012]; *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008], *appeal withdrawn*, 12 NY3d 813 [2009]). "[T]he Supreme Court has broad discretion in determining whether to grant leave, and its determination will not be lightly disturbed" (*Belus v Southside Hospital*, *supra*, quoting *Douglas Elliman, LLC v Bergere, supra* at 643; *Tarek Youssef Hassan Saleh v 5th Ave. Kings Fruit & Vegetables Corp.*, 92 AD3d 749, 750 [2d Dept 2012]).

The Court must consider whether there has been an undue delay in asserting the amendment and, where the action has long been certified ready for trial, to rule with caution and circumspection. *F.G.L. Knitting Mills v. 1087 Flushing Prop.*, 191 AD2d 533 (2d Dept. 1993). "Furthermore, '[t]he court will also note how long the amending party was aware of the facts upon which the motion was predicated, and whether it offers a reasonable excuse for its lengthy delay.'" *Id.*; *see also, Brooks v Robinson*, 56 AD3d 406 (2d Dept. 2008). "[T]he merits of a proposed amendment will not be examined on the motion to amend – unless the insufficiency or lack of merit is clear and free from doubt. *Norman v. Ferrara*, 107 AD2d 739 (2d Dept. 1985); *see also, Lucido, supra* at 226-227.

Here, Plaintiffs have not explained the decision to wait well over 3 years to amend their Complaint and the Notice of Claim and over a year since the case was certified for trial despite the "consortium" claim being based on the same facts as set forth in the complaint and developed during discovery.

The Court denies the motion to amend the Notice of Claim to include a claim by Mrs. Canberg. In denying this relief, this Court has considered the following factors: (a)

summary judgment motion was made by the County Defendant basing same, in part, upon Plaintiff's failure to name Mrs. Canberg as a claimant in the Notice of Claim; and that (b) Plaintiffs did not annex a copy of the proposed Notice of Claim and the facts alleged in the proposed amended complaint are the same facts set forth in the Complaint

Thus, the Court finds the proposed amended complaint both palpably insufficient and devoid of merit. See, cases cited above and *Shovak v. Long Island Commercial Bank*, 50 AD3d 1118, 1120 (2nd Dept. 2008) *lv to appeal dismissed in part, denied in part,* 11 NY3d 762 (2008); *Bolanowski v. Trustees of Columbia University*, 21 AD3d 340 (2nd Dept. 2005).

Accordingly, it is hereby

ORDERED, that the branch of Defendant's motion for an order granting summary judgment pursuant to CPLR §3212 dismissing the complaint is **DENIED;** and it is further

ORDERED, that the branch of Defendant's motion seeking to dismiss the cause of action on behalf of Patricia Canberg is **GRANTED**; and it is further

ORDERED, that Plaintiff's application to amend the Complaint and the Notice of Claim is **DENIED.**

This constitutes the decision and order of the court.

Dated: April 27, 2020
Mineola, NY

Steven M. Jaeger

Hon. Steven M. Jaeger
Acting Justice of the Supreme Court

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ENTERED
May 01 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE