

**Mendez v City of New York**

2021 NY Slip Op 30447(U)

February 17, 2021

Supreme Court, New York County

Docket Number: 155217/2013

Judge: J. Mabelle Sweeting

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

*Justice*

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JOHNNY MENDEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE  
DEPARTMENT, WELSBACH ELECTRIC CORP.,  
PETROCELLI ELECTRIC CO., DAIDONE ELECTRIC CO.,  
CON EDISON OF NY, INC., P.O. GOMEZ, RONNI MANELA,  
MUHAMMAD BUTT, HELLMAN ELECTRIC CORP

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 165, 167, 168, 169, 170, 171

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

**DECISION + ORDER ON  
MOTION**

In this action, plaintiff alleges that he sustained serious injuries on November 1, 2012 around 9:30 p.m. as he was driving on a motorcycle that was struck by a taxi at the intersection of 3<sup>rd</sup> Avenue and East 10<sup>th</sup> Street in Manhattan. Because this was in the immediate aftermath of Hurricane Sandy, the traffic lights at the intersection were not operational and a traffic officer was manually directing traffic. Plaintiff is suing<sup>1</sup> New York City (“NYC”), the NYC Police Department, the officer who was directing traffic (“Agent Gomez”), as well as the owner and the operator of the taxi.

<sup>1</sup> A number of other named defendants, including electric companies that plaintiff claims operated traffic lights and signals at the intersection, were dismissed from this action via prior court orders.

The instant motion is made by Corporation Counsel on behalf of NYC, the NYC Police Department and Agent Gomez (collectively, the “City”), seeking an order: (1) pursuant to Civil Practice Law and Rules (CPLR) § 3211 dismissing the complaint and all cross-claims or, alternatively, (2) pursuant to CPLR § 3212 granting summary judgment on behalf of said defendants. The crux of the City’s argument is twofold. First, the City argues that, pursuant to the public duty rule, the performance of governmental functions (such as directing traffic) cannot give rise to liability unless plaintiff both pleads and establishes the existence of a special duty, and that plaintiff failed to do so in this case. Second, the City argues that even if plaintiff had properly pled and established the existence of a special duty, the City remains entitled to summary judgment based on the defense of governmental immunity.

Defendants Ronni Manela (who owned the taxi) and Muhammed Zahid Butt (who was driving the taxi) (collectively, the “taxi driver”) filed a cross-motion seeking summary judgment in their favor pursuant to CPLR §3212. They argue that they bear no fault or liability as it is “uncontradicted” that the taxi “lawfully entered the intersection when following direction from the traffic agent, when defendants vehicle was then struck by Plaintiff’s motorcycle.”

In opposition to the City’s motion, plaintiff maintains that he asserted a claim for special duty and that a special duty existed. Plaintiff also argues that Agent Gomez is not entitled to governmental immunity because the actions challenged were routine and not discretionary.

With respect to the taxi driver’s cross-motion, plaintiff argues, in opposition, that there remains a question as to who had the right away, thus making summary judgment inappropriate.

Oral arguments were held before this court on December 3, 2020 and December 17, 2020. Upon the forgoing documents, and the arguments held before this court, the City’s motion is GRANTED and the cross-motion filed by the defendant taxi driver is DENIED.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

Here, plaintiff and the taxi driver each blame the other for having caused the accident. At the inception of the litigation, plaintiff alleged that the taxi driver was responsible for the accident. The complaint states, in relevant part: “As plaintiff was directed to go through the intersection, plaintiff was struck by the vehicle owned by defendant RONNI MANELA and driven by defendant MUHAMMAD ZAHID BUTT, traveling on East 10th Street. That defendant so carelessly and/or negligently operated his respective motor vehicle so as to cause the aforesaid contact and plaintiff’s injuries.” Furthermore, on page 3, paragraph 9 of the “Affirmation in Opposition to Defendant Butt’s Motion for Summary Judgement,” the plaintiff’s counsel asserts that “Defendant Butts bears the responsibility for the accident.” Conversely, the taxi driver argues that plaintiff caused the accident by failing to obey the direction of the agent, and that plaintiff unlawfully entered the

intersection and caused the accident. Under the above circumstances, there remain triable issues of fact. Accordingly, the taxi driver's cross-motion for summary judgment is DENIED.

With respect to the City's motion for summary judgment, a defendant cannot be liable for a plaintiff's injuries unless it owes a duty of care running directly to the injured person (Valdez v. City of New York, 18 N.Y.3d 69 [N.Y. Ct of Appeals 2011] [discussing "the general proposition that to sustain liability against a municipality, the duty breached must be more than that owed the public generally"]; Lauer v. City of New York, 95 N.Y.2d 95 [N.Y. Ct. of Appeals 2000] ["the 'direct contact' element, which is closely related to the element of reliance, serves to rationally limit the class of persons to whom the municipality's duty of protection runs and exists"]); Under the public duty rule, liability for the performance of governmental functions cannot attach unless plaintiff both pleads and establishes a special duty (McGinness v. City of New York, 113 A.D.3d 566 [Sup. Ct. App. Div. 1st Dept. 2014] ["Petitioners failed to allege facts that would establish that respondents had a special duty to the injured petitioner to protect him from an assault"]; Davis by Walker v. Owens, 259 A.D.2d 272 [Sup. Ct. App. Div. 1st Dept. 1999] ["Nor is there evidence of any voluntary assumption by the municipal defendant through its agents of a special duty to plaintiffs. Indeed, the complaint alleges nothing more than negligence in performance of statutory duties."]). Here, based on the papers and the arguments made before the court at oral argument, the court finds that Agent Gomez was performing a government function for which he had discretion (directing traffic) for which there was no special duty.

Given the findings above, the motion by the City is GRANTED. With respect to defendants NYC, the NYC Police Department and Agent Gomez, the complaint and all cross-claims are DISMISSED WITH PREJUDICE.

Further, the caption is to amended to reflect as such, and this matter is respectfully referred to a non-City part.

This is the decision and order of the court.

2/17/2021  
DATE

  
J. MACHELIE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE